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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. ~~1468~~. 909

SAMUEL FIELDEN, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

FILED OCTOBER 18, 1890.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1468.

SAMUEL FIELDEN, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

INDEX.

	Original.	Print.
Writ of error	*a*	1
Clerk's certificate as to copy of writ of error lodged in his office	*b*	1
Citation	*c*	2
Proof of service of citation	*d*	2
Clerk's certificate as to copy of citation lodged in his office	*e*	2
Clerk's certificate to transcript of record	*f*	3
Caption	1	3
Motion to correct record, &c.	2	4
Affidavit of Black & Salomon	4	5
Order that cause be stricken from the docket	6	6
Motion to set aside order to strike cause from docket and to amend record	7	6
Motion to correct record of judgment	9	7
Order continuing motion to next term	9	7
Affidavit of E. J. Walsh as to mailing notice	10	7
Notice of filing motion and affidavits	11	8
Motion to correct record, &c.	12	9
Affidavit of Black & Salomon	14	10
Order granting leave to reply to suggestions	17	11
Reply to suggestions	17	11
Affidavit of Fielden, Schwab, and Neebe	21	13
Notice of intention to file affidavit, &c.	22	13
Order taking motion for oral argument under advisement	24	14
Order denying motion to amend record	24	14
Motion for leave to amend original motion to correct record	25	15

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	Original.	Print.
Amended motion to correct record	25	15
Petition for rehearing	28	16
Motion for leave to take exceptions and to file bill of exceptions	30	17
Opinion	32	17
Order denying motions to amend motion to correct record, for a rehearing, and for leave to take exceptions and file a bill of exceptions	41	23
Petition for writ of error	42	23
Opinion on petition for writ of error	44	24
Bond	51	28
Stipulation as to facts, &c.	53	29
Judgment of supreme court of Illinois	53	29
Assignment of errors	56	31

a UNITED STATES OF AMERICA,
Northern District of Illinois, } *ss:*

The United States of America to the judges of the supreme court of the State of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment in a plea which is before you in said supreme court, between Samuel Fielden, plaintiff, and The People of the State of Illinois, defendant-, in an action of indictment, a manifest error hath happened, to the great damage of the said Samuel Fielden, plaintiff, as by his complaint appears, and it being fit that the error, if any there has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1890, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this second day of December, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the 114th year.

WM. H. BRADLEY,
Clerk of the Circuit Court of the United States
for the Northern District of Illinois.

[Endorsed:] Supreme Court of the United States. Samuel Fielden, plaintiff in error, *vs.* The People of the State of Illinois, defendant-in error. Writ of error.

b In the Supreme Court of Illinois, Northern Grand Division.

SAMUEL FIELDEN, Impleaded, Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF ILLINOIS.
} Error to Criminal Court, Cook.

I, Alfred H. Taylor, clerk of said court, do hereby certify that on the seventh day of July, in the year 1890, a copy of the foregoing writ of error for the defendants in error was lodged in my office, at Ottawa.

Witness my hand and the seal of this court this seventh day of July, A. D. 1890.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

A. H. TAYLOR,
Clerk Supreme Court of Illinois.

c UNITED STATES OF AMERICA,
Northern District of Illinois, } *ss:*

To the People of the State of Illinois, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, A. D. 1890, pursuant to a*n* writ of error filed in the clerk's office of the supreme court of the State of Illinois for the northern grand division of Illinois, wherein Samuel Fielden, impleaded, &c., is plaintiff in error an- you are defendant- in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error, as in the said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Simeon P. Shope, chief justice of the supreme court of Illinois, this thirtieth day of January, in the year of our Lord one thousand eight hundred and ninety.

S. P. SHOPE.

d [Endorsed:] Supreme Court of the United States. Samuel Fielden, impleaded, &c., *vs.* The People of the State of Illinois. Citation to October term, A. D. 18—.

I hereby accept service of the within citation on behalf of the People of the State of Illinois.

GEO. HUNT,
Attorney General.

January 31, 1890.

e In the Supreme Court of Illinois, Northern Grand Division.

SAMUEL FIELDEN, Impleaded, &c., Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF ILLINOIS, Defendants in Error.
} Error to Criminal Court, Cook.

I, Alfred H. Taylor, clerk of said court, do hereby certify that on the seventh day of July, in the year 1890, a copy of the foregoing citation and return was lodged in my office, at Ottawa.

Witness my hand and the seal of this court this seventh day of July, A. D. 1890.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

A. H. TAYLOR,
Clerk of Supreme Court.

f In the Supreme Court of Illinois, Northern Grand Division.

Samuel Fielden, Impleaded, &c., Plaintiff in Error,
vs.
The People of the State of Illinois, Defendant- in Error.
} Error to Criminal Court, Cook.

I, Alfred H. Taylor, clerk of the supreme court of Illinois for the northern grand division, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from one (1) to fifty-two (52), incluseive, contain a true and complete transcript and copy of the record and proceedings had in said court subsequent to September fourteenth, A. D. 1887, in the case which is above entitled, and of the whole thereof, as the same remain of record and on file in my said office.

Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.

In testimony whereof I have hereunto set my hand and caused the seal of the said supreme court of Illinois to be hereunto affixed, at Ottawa, in said State, this seventh day of July, in the year of our Lord one thousand eight hundred and ninety.

A. H. TAYLOR,
Clerk of Supreme Court, Illinois.

1 State of Illinois,
Supreme Court, Northern Grand Division. }

At a supreme court begun and held at Ottawa on Tuesday, the sixth day of March, in the year of our Lord one thousand eight hundred and eighty-eight, within and for the northern grand division of the State of Illinois.

Present: Benj. R. Sheldon, chief justice; John M. Scott, justice; John Scholfield, justice; John H. Mulkey, justice; Alfred M. Craig, justice; Simeon P. Shope, justice; Benj. D. Magruder, justice; George Hunt, attorney general; Lawrence Morrissey, sheriff; Alfred H. Taylor, clerk.

2 Be it remembered that afterwards, to wit, on the 5th day of March, A. D. 1888, a certain motion in writing was filed in words and figures following:

STATE OF ILLINOIS, } ss:
Cook County, }

In the Supreme Court of the State of Illinois, Northern Grand Division. September Term, A. D. 1887.

AUGUST SPIES, MICHAEL SCHWAB, SAMUEL Fielden, Albert R. Parsons, Adolph Fischer, George Engel, Louis Ling, and Oscar W. Neebe
vs.
THE PEOPLE OF THE STATE OF ILLINOIS.
} Error to the Criminal Court of Cook County.

And now comes the plaintiff in error, Samuel Fielden, and the plaintiff in error, Michael Schwab, and the plaintiff in error, Oscar W. Neebe, and each for himself says that in a certain entry upon the records in the above-entitled cause purporting to have been entered on the 14th day of September, A. D. 1887, there is error, and the said entry on said record in said cause is false and untrue, the recital in said record being as follows: "On this day came again the said parties, and the court having diligently examined and inspected as well the records and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the court now here that neither in the record or proceedings aforesaid nor in the rendition of the judgment aforesaid is there anything erroneous, vicious, or defective, and that that record is no error, therefore it is considered by the court that the judgment aforesaid
3 be affirmed in all things as to each and every of said plaintiffs
in error and stand in full force and effect, notwithstanding the said matters and things therein assigned for error; and it is further ordered by the court that the 11th day of November, A. D. 1887, be, and the same is hereby, fixed as the time when the sentence of death pronounced upon said plaintiffs in error, August Spies, Michael Schwab, Samuel Fielden, Albert R. Parsons, Adolph Fischer, George Engel, and Louis Ling, by the criminal court of Cook county, Illinois, shall be executed. '

"And it is further ordered by the court that the sheriff of Cook county, Illinois, be, and he is hereby, ordered and directed to carry into execution the sentence by the criminal court of Cook county, Illinois, of the defendants in the indictment, August Spies, Michael Schwab, Samuel Fielden, Albert Parsons, Adolph Fischer, George Engel, and Louis Ling, on Friday, the 11th day of November next (November 11th, A. D. 1887), between the hours of 10 o'clock in the forenoon and four o'clock in the afternoon of that day.

"And it is further considered by the court that the said defendants in error recover of and from the said plaintiffs in error their costs by them in this behalf expended, and that they have execution therefor."

Whereas in truth and in fact, as each plaintiff in error is ready to verify, he nor any of his coplaintiffs in error was present in said court at the time of the rendering of the said judgment last above recited, either in person or by his attorneys or either or any of them, nor were they, the plaintiffs *of* error, or either or any of them or their counsel or either or any of them, notified to be present, either in person or by attorneys; and this each plaintiff in error is ready to verify; and the recital therein contained, "On this day came again the said parties," is wholly false and untrue. Wherefore plaintiffs in error and your petitioners and each of them pray that the said 4 record may be amended to conform with the truth and the fact, and that it may appear upon the face of the said record that at the time of the rendering of said judgment hereinbefore recited neither the plaintiffs in error or either or any of them nor their attorneys or any or either of them were present in court, nor were they notified to be present; and this your petitioners will ever pray.

SAMUEL FIELDEN,
MICHAEL SCHWAB,
OSCAR W. NEEBE,
By W. P. BLACK AND M. SALOMON,
Their Attorneys.

W. P. BLACK,
M. SALOMON,
Att'ys for Pet'nr's & Plaintiffs in Error.

In the Supreme Court of Illinois, to the March Term, A. D. 1888.

SAMUEL FIELDEN, OSCAR W. NEEBE, and MICHAEL SCHWAB, Impleaded with AUGUST SPIES *et al.*, *vs.* THE PEOPLE OF THE STATE OF ILLINOIS.	Error to the Criminal Court of Cook County.

STATE OF ILLINOIS, } *ss:*
County of Cook, }

W. P. Black and Moses Salomon, each being duly sworn, on oath says that on the 14th day of September, 1887, at the time of the filing of the opinion of this court in the above-entitled cause, neither the attorneys of said plaintiffs in error were present in said court 5 nor were said plaintiffs nor any of them therein; that at that time, to the knowledge of these affiants, said plaintiffs in error and each and every of them were confined in the county jail of Cook county, in the city of Chicago and State of Illinois. And these affiants further say that, so far as these affiants know, no notice was at any time given to any of the said plaintiffs in error nor to any of the attorneys of said plaintiffs in error to be present on said 14th day of September, 1887; but the filing of the opinion in said cause upon that date and the entry upon that day of the judgment of affirmance therein was in the absence of and without notice to said plaintiffs in error and every thereof and their attorneys respectively.

And further affiants sayeth not.

W. P. BLACK.
MOSES SALOMON.

Subscribed and sworn to before me this 3rd day of March, A. D. 1888.

[NOTARIAL SEAL.] ALLEN B. CHILCOAT,
Notary Public.

(Endorsed:) Supreme court Ill. Samuel Fielden, Oscar W. Neebe, and Michael Schwab, impleaded with August Spies *et al.*, *vs.* The People of the State of Illinois. Error to the criminal court of Cook county. Filed March 5th, 1888. A. H. Taylor, clerk. W. P. Black, M. Salomon, atty's for pet'n'rs, of plaintiffs in error.

6 And afterwards, to wit, on the 16th day of March, A. D. 1888, certain proceedings were had and orders made by the court and entered of record, among which is the following, viz:

SAMUEL FIELDEN *et al.*
vs.
THE PEOPLE OF THE STATE OF ILLINOIS. } Docket for Motion.

And now, on this day, it is considered by the court that this cause be, and the same is hereby, stricken from the docket.

7 Be it remembered that afterwards, to wit, on the 22d day of March, A. D. 1888, a certain motion in writing was filed in words and figures following:

STATE OF ILLINOIS,
Cook County, } *ss:*

In the Supreme Court of the State of Illinois, Northern Grand Division. March Term, A. D. 1888.

AUGUST SPIES, MICHAEL SCHWAB, SAMUEL Fielden, Albert R. Parsons, Adolph Fischer, George Engel, Louis Ling, and Oscar W. Neebe
vs.
THE PEOPLE OF THE STATE OF ILLINOIS. } Error to the Criminal Court of Cook County.

And now comes the plaintiffs in error, impleaded in the above-entitled cause, Samuel Fielden, Michael Schwab, and Oscar W. Neebe, and move the court to set aside the order striking the case from the docket, and further move the court to amend the record in the above-entitled cause, so that it may appear upon the record in said cause that at the time the judgment in said cause was entered the said plaintiffs in error were not present in court, and that said judgment was entered in their, said plaintiffs in error, absence, as appears from the motion filed in this court March 5th, A. D. 1888, and to which petition petitioners refer and made a part thereof.

Respectfully submitted.

W. P. BLACK,
M. SALOMON,
Attorneys for Petitioners.

8 (Endorsed:) In the supreme court of the State of Illinois, northern grand division. Samuel Fielden, impleaded, *et al.* *vs.* The People of the State of Illinois. Motion to set aside order and to amend record. Filed Mar. 22, 1888. A. H. Taylor, clerk. W. P. Black & M. Salomon, att'ys for plaintiffs in error.

9 And afterwards, to wit, on the 23d day of March, A. D. 1888, certain proceedings were had by said court, among which is the following, viz:

SAMUEL FIELDEN *et al.*
vs.
THE PEOPLE, &c.
} 11 P. D. Motion to Correct Judgment.

Now, on this day, comes said plaintiffs in error, by Moses Salomon, their attorney, and moves the court to correct the record of the judgment herein.

Which motion is by the court taken under advisement.

And afterwards, to wit, on the 26th day of March, A. D. 1888, certain proceedings were had by said court, among which is the following, viz:

SAMUEL FIELDEN *et al:*
vs.
THE PEOPLE, &c.
} 11 P. D. Motion to Correct Judgment.

Now, on this day, the consideration of the motion herein is continued to the next term of this court.

10 Be it remembered that afterwards, to wit, on the 11th day of June, A. D. 1888, a certain affidavit in writing was filed in words and figures following:

STATE OF ILLINOIS,
Cook County,
} *ss:*

In the Supreme Court of said State of Illinois, Northern Grand Division.

SAMUEL FIELDEN, MICHAEL SCHWAB, OSCAR NEEBE, Impleaded, etc.,
vs.
THE PEOPLE OF THE STATE OF ILLINOIS.
} Error to the Criminal Court of said County.

E. J. Walsh, being duly sworn, deposes and says that he is a law clerk in the office of M. Salomon, attorney for plaintiffs in error; affiant further says that he mailed, by register letter, number 34147, P. O. of Chicago, on the ninth day of June, A. D. 1888, to the Honorable George Hunt, attorney general, Springfield, Ill., a copy of the notice and of the motion and of the affidavits heretofore filed in said court, and copies of which are hereto attached to this affidavit; affiant further says that, to the best of affiant's present recollection, a copy of the said notice and a copy of the said motion

and a copy of the said affidavits were made in the office of said M. Salomon on the 23rd day of March, A. D. 1888, and placed in an envelope, addressed to said George Hunt, on the same afternoon, and that one of the clerks in the office of M. Salomon was directed to mail the same, and affiant believes that the same was mailed to said George Hunt on the said afternoon; affiant further says that on the third day of April, A. D. 1888, this affiant wrote to
11 said George Hunt a letter for and at the request of said M. Salomon in the language following, to wit:

"DEAR SIR: A few days ago I had mailed to you a copy of the motion made by me in the supreme court in the case of Spies *et al.* *vs.* The People, and also a copy of affidavits filed therewith.

Please inform me by return mail if the same were received by you and oblige,

Yours truly,

M. SALOMON,
By WALSH."

Affiant further says that this letter, duly stamped, was taken by one of the clerks of said M. Salomon's office to be mailed, and this affiant believes that same was mailed to said George Hunt on the said third day of April, to which letter, however, said George Hunt made no reply.

And further this affiant saith not.

E. J. WALSH.

Subscribed and sworn to before me this 9th day of June, A. D. 1888.

[NOTARIAL SEAL.]

CHARLES WERNO,
Notary Public.

SAMUEL FIELDEN, MICHAEL SCHWAB, and OSCAR W. NEEBE, Impleaded, etc.,
vs.
THE PEOPLE OF THE STATE OF ILLINOIS.
} Writ of Error to Cook County.

To Hon. Geo. Hunt, attorney general of the State of Illinois, and Hon. J. M. Longnecker, State's attorney for Cook county, Illinois.

GENTLEMEN: You are hereby notified that we have filed in the northern grand division of the supreme court of the State of Illinois, at the city of Ottawa, a motion and affidavits, copies of which are herewith delivered to you, and that the same has, this
12 23rd day of March, A. D. 1888, been taken under consideration by the court, and which you will please take notice and take such action as you see fit.

Yours respectfully,

W. P. BLACK,
M. SALOMON,
Attorneys for Plaintiffs in Error.

STATE OF ILLINOIS, } ss:
Cook County, }

In the Supreme Court of the State of Illinois, Northern Grand Division. September Term, A. D. 1887.

AUGUST SPIES, MICHAEL SCHWAB, SAMUEL Fielden, Albert R. Parsons, Adolph Fischer, George Engel, Louis Ling, and Oscar W. Neebe *vs.* THE PEOPLE OF THE STATE OF ILLINOIS.	Error to the Criminal Court of Cook County.

And now comes the plaintiff in error Samuel Fielden and the plaintiff in error Michael Schwab and the plaintiff in error Oscar W. Neebe, and each for himself says that in a certain entry upon the records in the above-entitled cause, purporting to have been entered on the 14th day of September, A. D. 1887, there is error, and the said entry on the said record in said cause is false and untrue, the recital in the said record being as follows: "On this day came again the said parties, and the court having diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the court now here that neither in the record or proceedings aforesaid nor in the rendition of the judgment aforesaid is there anything 13 erroneous, vicious, or defective, and that that record is no error, therefore it is considered by the court that the judgment aforesaid be affirmed in all things as to each and every of said plaintiffs in error and stand in full force and effect, notwithstanding the said matters and things therein assigned for error; and it is further ordered by the court that the 11th day of November, A. D. 1887, be, and the same is hereby, fixed as the time when the sentence of death pronounced upon said plaintiffs in error, August Spies, Michael Schwab, Samuel Fielden, Albert R. Parsons, Adolph Fischer, George Engel, and Louis Ling, by the criminal court of Cook county, Illinois, shall be executed.

"And it is further ordered by the court that the sheriff of Cook county, Illinois, be, and he is hereby, ordered and directed to carry into execution the sentence by the criminal court of Cook county, Illinois, of the defendants in the indictment, August Spies, Michael Schwab, Samuel Fielden, Albert Parsons, Adolph Fischer, George Engel, and Louis Ling, on Friday, the 11th day of November next (November 11th, A. D. 1887), between the hours of ten o'clock in the forenoon and four o'clock in the afternoon of that day.

And it is further considered by the court that the said defendants in error recover of and from the said plaintiffs in error their costs by them in this behalf expended, and that they have execution therefor."

Whereas in truth and in fact, as each plaintiff in error is ready to verify, he nor any of his coplaintiffs in error was present in said court at the time of the rendering of the said judgment last above

recited, either in person or by his attorneys or either or any of them, nor were they, the plaintiffs in error, or either or any of them or their counsel or either or any of them notified to be present, either in person or by attorney; and this each plaintiff in error is ready to verify; and the recital therein contained, "On this day
14 came again the said parties," is wholly false and untrue.

Wherefore the plaintiffs in error and your petitioners and each of them pray that the said record may be amended to conform with the truth and the fact, and that it may appear upon the face of the said record that at the time of the rendering of the said judgment hereinbefore recited neither the plaintiffs in error or either or any of them nor their attorneys or any or either of them were present in court, nor were they notified to be present; and this your petitioners will ever pray.

(Signed) SAMUEL FIELDEN,
MICHAEL SCHWAB,
OSCAR W. NEEBE,
By W. P. BLACK AND
M. SALOMON,
Their Attorneys.

M. SALOMON,
Attorney for Plaintiff in Error and for Petitioners.

In the Supreme Court of Illinois, to the March Term, A. D. 1888.

SAMUEL FIELDEN, OSCAR W. NEEBE, and MICHAEL SCHWAB, Impleaded with AUGUST SPIES *et al.*,
vs.
THE PEOPLE OF THE STATE OF ILLINOIS.
} Error to the Criminal Court of Cook County.

STATE OF ILLINOIS, *Cook County,* } *ss:*

W. P. Black and Moses Salomon, each being duly sworn, on oath say that on the 14th day of September, 1887, at the time of the filing of the opinion of this court in the above-entitled cause, neither of the attorneys of the said plaintiffs in error were present in
15 said court, nor were said plaintiffs nor any of them herein;
that at the time, to the knowledge of these affiants, said plaintiffs and each and every of them were confined in the county jail of Cook county, in the city of Chicago and State of Illinois; and these affiants further say that, so far as these affiants know, no notice was at any time given to any of the said plaintiffs in error to be present on said 14th day of September, 1887, but the filing of the opinion in said case upon that date and the entry upon that day of the judgment of affirmance therein was in the absence of and without notice to said plaintiffs in error and every thereof and their attorneys respectively; and further affiants sayeth not.

(Signed) W. P. BLACK.
(Signed) M. SALOMON.

(Endorsed:) Filed June 11th, 1888. A. H. Taylor, clerk.

16 STATE OF ILLINOIS,
Supreme Court, Northern Grand Division.

At a supreme court begun and held at Ottawa on Tuesday, the fourth day of September, in the year of our Lord one thousand eight hundred and eighty-eight, within and for the northern grand division of the State of Illinois.

Present: Alfred M. Craig, chief justice; John Scholfield, justice; Benj. D. Magruder, justice; David J. Baker, justice; Simeon P. Shope, justice; Joseph M. Bailey, justice; Jacob W. Wilkin, justice; George Hunt, attorney general; Lawrence Morrissey, sheriff; Alfred H. Taylor, clerk.

17 And afterwards, to wit, on the 28th day of September, A. D. 1888, certain proceedings were had and orders made by the court and entered of record, among which is the following, viz:

SAMUEL FIELDEN *et al.*
vs.
THE PEOPLE, &c.
1 P. D. Error to Criminal Court, Cook.

And now, on this day, leave is by the court granted plaintiffs in error to file reply to suggestions of defendants in error, and this cause continued.

Which said suggestions are in words & figures following, viz:

In the Supreme Court of the State of Illinois, Northern Grand Division. September Term, 1888.

SAMUEL M. FIELDEN *et al.*, Impleaded, etc.,
vs.
THE PEOPLE OF THE STATE OF ILLINOIS.
Motion to Correct Record. Reply to Suggestions Filed by Attorney General.

1. As to the first suggestion, that the recital in the record "on this day again came the parties" was not false, but in contemplation of law was true:

A. The motion, supported by affidavits, stands uncontradicted, that the defendants nor their counsel were present in court at the time of the rendering judgment against them, and that fact will therefore be taken as true by this court.

B. The statement in the record "on this day again came the parties" is not a fiction of law, but purports to be and is regarded as an absolute statement of a truth—that is, that the parties were actually present in court at the time of pronouncing judgment against them, and this statement is false and should be corrected by this court, as said by the Supreme Court of the United States. 18

Supreme Court Reporter, vol. 8, No. 1, p. 32, where C. J. Waite says in *Ex parte* Spies and others:

"The objections that the defendants were not actually present in the supreme court of the State at the time sentence was pronounced cannot be made on the record as it now stands, because on its face it shows that they were present. If this is not in accordance with the fact the record must be corrected below."

2. As to the second objection of the attorney general, that "the parties, plaintiff- in error, were not tried in this court and their personal presence was not necessary to enable this court to take jurisdiction or consider and decide the questions involved in the assignment of errors:"

A. Assuming this position of the attorney general's to be correct, there should be no objection coming from him that the record be amended so as to be in accordance with the fact, and that it state that defendants were not present.

B. Whether the presence of the parties was or was not essential is not a matter, we respectfully submit, to be considered by the court on this motion. The uncontradicted fact that the parties were not present and the recital in the record that they were present requires this court to correct the record so that it speak the truth.

3. The third and last objection, that this motion is not the proper mode to correct the error, that it should be done on application for a rehearing, cannot be entertained, as this court has said.

Life Association of America *v.* Fassett, 102 Ill., p. 330:

19 That the proper practice to correct an error in a record is by motion, as here pursued. We respectfully submit that objections urged by the attorney general are frivolous, and that the motion of applicants should be granted and the record corrected to conform to the truth and the fact.

W. P. BLACK,
M. SALOMON,
Att'ys for Fielden et al.

(Endorsed:) Northern grand division, supreme court, State of Illinois. Sam'l Fielden *et al. vs.* The People of the State of Illinois. Reply to suggestions. Filed Oct. 1, 1888. A. H. Taylor, clerk. W. P. Black, M. Salomon, att'ys for Fielden *et al.*

20 STATE OF ILLINOIS, }
Supreme Court, Northern Grand Division. }

At a supreme court begun and held at Ottawa on Tuesday, the fifth day of March, in the year of our Lord one thousand eight hundred and eighty-nine, within and for the northern grand division of the State of Illinois.

Present: Alfred M. Craig, chief justice; John Scholfield, justice; Benj. D. Magruder, justice; David J. Baker, justice; Simeon P. Shope, justice; Joseph M. Bailey, justice; Jacob W. Wilkin, justice; George Hunt, attorney general; Lawrence Morrissey, sheriff; Alfred H. Taylor, clerk.

21 Be it remembered that afterwards, to wit, on the 7th day of March, A. D. 1889, a certain affidavit in writing was filed in words and figures following, viz:

STATE OF ILLINOIS:

In the Supreme Court, Northern Grand Division.

SAMUEL FIELDEN *et al.*
vs.
THE PEOPLE OF THE STATE OF ILLINOIS. } Motion to Amend Record.

STATE OF ILLINOIS,
Will County, } *ss:*

Samuel Fielden, Michael Schwab, and Oscar Neebe, each, being duly sworn, on oath says that as a matter of fact he was not present in the supreme court of the State of Illinois, at Ottawa or elsewhere, on the day or at the time when said court announced its affirmance of the judgment in the case of Spies *et al. versus* The People of the State of Illinois, on the criminal docket of said court, and its judgment in said case sentencing this affiant Neebe to fifteen (15) years' confinement in the penitentiary and sentencing these affiants Fielden & Schwab, respectively, together with other parties who were plaintiffs in error in said proceedings, to death; nor was any notice served upon these affiants or either of them to be present in said court at said time and on the pronouncement of said sentence, nor could these affiants nor either of them be so present, because at that time these affiants and each of them were confined in the common jail of Cook county, in the State of Illinois, and were deprived of their liberty and prevented from going to appear or attending in any manner in said court or elsewhere; nor was any person present in said proceedings in said court at said time or on said occasion
22 representing or authorized to represent these affiants or either of them, nor did the attorneys of these affiants nor any of said attorneys have any notice of the proposed proceedings nor any opportunity, in fact, to appear or attend upon said occasion in said court, as these affiants are informed and verily believe.

SAMUEL FIELDEN.
MICHAEL SCHWAB.
O. W. NEEBE.

Subscribed and sworn to before me this 2nd day of March, A. D. 1889.

[NOTORIAL SEAL.] GALLUS MULLER,
Notary Public.

CHICAGO, *March 4th*, 1889.

Hon. George Hunt, attorney general of State of Ill.

DEAR SIR: Enclosed please find copy of affidavit which I shall file in the supreme court of the State of Illinois, in the northern grand division, on Thursday morning, March 7th, in the case of Fielden *et al. vs.* The People, in support of the motion heretofore entered to amend the record, and I shall also at said time ask the said court to pass upon said motion or fix a date for the hearing of the same, at which time and place you can appear if you see fit.

Yours respectfully, W. P. BLACK.
M. SALOMON.

Dictated.

23 STATE OF ILLINOIS, } *ss:*
Cook County, }

Leo Salomon, being duly sworn, deposes and says that he mailed to the Hon. George Hunt, attorney general of the State of Illinois, a register- letter on the 4th day of March, A. D. 1889, in the post office of Chicago, said county and State aforesaid, containing copies of the affidavits and the notice hereto attached; and further this affiant saith not.

LEO SALOMON.

Subscribed and sworn to by Leo Salomon before me this 6th day of March, A. D. 1889.

[NOTORIAL SEAL.] MOSES SALOMON,
Notary Public.

(Endorsed:) State of Illinois, supreme court, northern grand division. March term, A. D. 1889. Samuel Fielden *et al. vs.* The People of the State of Illinois. Affidavit in support of motion to amend record. Filed M'ch 7th, 1889. A. H. Taylor, clerk. W. P. Black & M. Salomon, att'ys for pet'n'rs.

24 And afte-wards, to wit, on the 7th day of March, A. D. 1889, certain proceedings were had by said court, among which is the following, viz:

SAMUEL FIELDEN *et al.*
vs. } 1 P. D. Motion.
THE PEOPLE OF THE STATE OF ILLINOIS.

Now, on this day, comes said plaintiff- in error, by M. Salomon, attorney, and moves the court for leave to argue orally the motion entered herein, and that a day certain be set therefor; which motion is by the court taken under advisement.

And afterwards, to wit, on the 15th day of March, A. D. 1889, certain proceedings were had by said court, among which is the following, viz:

SAMUEL FIELDEN *et al.*
vs. } 1 P. D. Motion.
THE PEOPLE, &c.

And now, on this day, the court having duly considered the motion of plaintiff- in error to amend the record therein, and being fully advised of and concerning the premises, it is considered by the court that said motion be, and the same is hereby, overruled and denied.

And afterwards, to wit, on the 26th day of March, A. D. 1889, a certain motion and petition in writing was filed in words and figures following, viz:

25 In the Supreme Court of the State of Illinois, Northern Grand Division. March Term, A. D. 1889.

August Spies, Michael Schwab, Samuel Fielden, Albert R. Parsons, Adolph Fischer, George Engel, Louis Ling, and Oscar W. Neebe
vs.
The People of the State of Illinois.
} Error to the Criminal Court of Cook County.

And now come the said plaintiffs in error, Samuel Fielden, Michael Schwab, and Oscar W. Neebe, by W. P. Black and M. Salomon, their attorneys, and move the court for leave to amend the original motion made herein, wherein it is sought to have the record in the above-entitled cause amended so as to show the fact that plaintiffs in error were not actually present in court at the time judgment was pronounced against them, and herewith present said amendment and ask that an order be entered permitting the same to be filed of record; and this petitioners will ever pray.

W. P. BLACK,
M. SALOMON,
Attorneys for Plaintiffs in Error.

In the Supreme Court of the State of Illinois, Northern Grand Division. March Term, A. D. 1889.

August Spies, Michael Schwab, Samuel Fielden, Albert R. Parsons, Adolph Fischer, George Engel, Louis Lingg, and Oscar W. Neebe
vs.
The People of the State of Illinois.
} Error to the Criminal Court of Cook County.

26 And now comes the plaintiff in error Samuel Fielden and the plaintiff in error Michael Schwab and the plaintiff in error Oscar W. Neebe, by W. P. Black and M. Salomon, their attorneys, and, by leave of court first had and obtained for that purpose, files this amendment to the original motion heretofore made and entered, that this court correct the error in the entry on the records of this court wherein it is stated "On this day came again the said parties," and amends the said motion in the following particulars, by inserting after the last line of said motion and preceding the signature of Samuel Fielden the following words, to wit:

"And in support of said motion to amend said record your petitioners file herewith and refer to the same in support of amendment of said record the affidavits of Samuel Fielden, Michael Schwab, Oscar W. Neebe, petitioners, and W. P. Black and M. Salomon, petitioners' attorneys, wherein it is set forth that none of the plaintiffs in error appeared or could appear in this honorable court, where the said judgment was given, nor were they or any of them present by counsel on said occasion, nor were their counsel notified or furnished opportunity to be present on said occasion; and petitioners further say and allege and claim that the said recital in said record deprives petitioners and said plaintiffs in error of substantial rights guaranteed the said plaintiffs in error by the Constitution of the United States and by the constitution of the State of Illinois, and particularly in said recital on said record and the judgment of this court in violation of the 14th amendment to the Constitution of the United States and in violation of section two of article two of the constitution of the State of Illinois; and plaintiffs in error claim the benefit, right, privileges, and immunities guaranteed by the constitutional provisions referred to.

Wherefore petitioners pray that the said record may be amended to conform to the truth and the fact and show that petitioners were not actually present at the time said judgment was pronounced. 27

SAMUEL FIELDEN,
MICHAEL SCHWAB, AND
OSCAR W. NEEBE,
By W. P. BLACK &
M. SALOMON.

W. P. BLACK &
M. SALOMON,
Attorneys for Plaintiffs in Error.

(Endorsed:) In the supreme court of Illinois, northern grand division. Fielden *et al. vs.* People of the State of Illinois. Motion for leave to file amendment to original motion to correct record & amendment to original motion. Filed March 26, '89. A. H. Taylor, clerk. W. P. Black & M. Salomon, att'ys for pl'ffs in error.

28 In the Supreme Court of the State of Illinois, Northern Grand Division. March Term, A. D. 1889.

AUGUST SPIES, MICHAEL SCHWAB, SAMUEL Fielden, Albert R. Parsons, Adoph Fischer, George Engel, Louis Lingg, & Oscar W. Neebe *vs.* THE PEOPLE OF THE STATE OF ILLINOIS.	Error to the Criminal Court of Cook County.

And now comes the said Samuel Fielden, Michael Schwab, and Oscar W. Neebe, by W. P. Black and M. Salomon, their attorneys, and moves the court for a rehearing of the motion heretofore made in this court, that this court amend the record wherein it is recited that "on this day came again the said parties," said recital on said record being wholly false and untrue; that no opinion having been filed by this court upon deciding said motion heretofore filed and the same being overruled that petitioners claim and insist that said entry on said record, not being the truth and the fact, as shown by

the affidavits filed in this court of the said Samuel Fielden, Michael Schwab, and Oscar W. Neebe, and also the affidavits of W. P. Black and M. Salomon in support thereof, and the decision of this court in overruling said motion and in refusing to amend the record as requested by petitioners, that the said record shall show and speak the truth, is in violation of the constitutional provisions of the Constitution of the United States and also in violation of the provisions of the constitution of the State of Illinois, and thereby petitioners are deprived of their constitutional rights, privileges, and immunities; and petitioners insist that said decision of this court in
29 overruling said motion is in violation of the 14th amendment of the Constitution of the United States and other provisions of said Constitution, and also is in violation of section two of article two and other provisions of the constitution of the State of Illinois; and petitioners claim and insist that no legal judgment could be pronounced upon them in this proceeding by this court unless they are personally brought before the court and are actually present when the judgment against them is to be pronounced; that the refusal by this court to amend the said record and permitting it to stand as it now is deprives petitioners of their rights and privilege of questioning the judgment of this court in so pronouncing judgment, if petitioners shall see fit so to do, in the United States Supreme Court, to which petitioners claim they have a right of appeal from the judgment of this court condemning petitioners.

Wherefore petitioners pray that a rehearing may be granted to your petitioners of the said motion; and this your petitioners will ever pray.

SAMUEL FIELDEN,
MICHAEL SCHWAB,
OSCAR W. NEEBE,
By W. P. BLACK &
M. SALOMON.

W. P. BLACK,
M. SALOMON,
Attorneys for Plaintiffs in Error.

(Endorsed:) In the supreme court of Illinois, northern grand division. Fielden *et al. vs.* The People of the State of Illinois. Petition for rehearing. Filed M'ch 26, '89. A. H. Taylor, cl'k. W. P. Black & M. Salomon, attornies for petitioners.

30 In the Supreme Court of the State of Illinois, Northern Grand Division. March Term, A. D. 1889.

AUGUST SPIES, MICHAEL SCHWAB, SAMUEL Fielden, Albert R. Parsons, Adolph Fischer, George Engel, Louis Lingg, & Oscar W. Neebe *vs.* THE PEOPLE OF THE STATE OF ILLINOIS.	Error to the Crimi- Court of Cook County.

And now comes the said Samuel Fielden, Michael Schwab, and

Oscar W. Neebe, by W. P. Black and M. Salomon, their attorneys, and excepts to the judgment of this honorable court in overruling the motion of petitioners to amend the record herein so that the same will show that petitioners were not actually present in court at the time judgment in this cause was pronounced, and pray that the said exception to the said decision overruling said motion may be entered of record; and petitioners further pray that this court will fix a reasonable time for the filing of a bill of exceptions herein, said bill of exceptions to be signed and sealed by the chief justice of this honorable court and be made a part of the records of this court, or as this honorable court may direct, and said bill of exceptions to contain the motions, amendment to motion, petition for a rehearing, and affidavits filed in support of the motion to correct the record herein, and such other proceedings as have been connected herewith; and this your petitioners will ever pray.

W. P. BLACK,
M. SALOMON,
Attornies for Plaintiffs in Error.

31 (Endorsed:) In the supreme court of Illinois, northern grand division. Fielden *et al. vs.* People of the State of Illinois. Motion for leave to take exceptions & for leave to file a bill of exceptions. Filed March 26, '89. A. H. Taylor, cl'k. W. P. Black & M. Salomon, attornies for plaintiffs in error.

32 Be it remembered that afterwards, to wit, on the 16th day of May, A. D. 1889, the opinion of the court was filed in the clerk's office of said court in words and figures following, to wit:

SAMUEL FIELDEN *et al.*
vs.
THE PEOPLE, &c.
} No. 1 P. D. Error to —. Dock. for Motion. Appeal from —.

33 At the March term, 1888, of this court motion was made to this court in the words following:

"And now comes the plaintiff in error Samuel Fielden and the plaintiff in error Michael Schwab and the plaintiff in error Oscar W. Neebe, and each for himself says that in a certain entry upon the records in the above-entitled cause, purporting to have been entered on the 14th day of September, A. D. 1887, there is error, and the said entry on said record in said cause is false and untrue, the recital in said record being as follows: "On this day came again the said parties, and the court having diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the court now here that neither in the record or proceedings aforesaid nor in the rendition of the judgment aforesaid is there anything erroneous, vicious, or defective, and that that record is no error, therefore it is considered by the court that the judgment aforesaid be affirmed in all things as to each and every of said plaintiffs in error and stand in full force and effect, notwithstanding the said matters and things therein assigned for error; and it is further ordered by the court that the 11th day of November, A. D. 1887, be, and the same is, fixed as the time when the sentence of death pronounced upon said plaintiffs in error, August Spies, Michael Schwab, Samuel Fielden, Albert R. Parsons, Adolph Fischer, George Engel, and Louis Lingg, by the criminal court of Cook county, Illinois, shall be executed.

"And it is further ordered by the court that the sheriff of Cook county, Illinois, be, and he is hereby, ordered and directed to carry into execution the sentence by the criminal court of Cook
34 county, Illinois, of the defendants in the indictment, August Spies, Michael Schwab, Samuel Fielden, Albert R. Parsons, Adolph Fischer, George Engel, and Louis Lingg, on Friday, the 11th day of November next (November 11th, A. D. 1887), between the hours of 10 o'clock in the forenoon and 4 o'clock in the afternoon of that day.

"And it is further considered by the court that the said defendants in error recover of and from the said plaintiffs in error their costs by them in this behalf expended, and that they have execution therefor."

Whereas in truth and fact, as each plaintiff in error is ready to verify, he nor any of his coplaintiffs in error was present in said court at the time of the rendering of the said judgment last above recited, either in person or by his attorneys or either or any of them, nor were they, the plaintiffs in error, or either or any of them or their counsel or either or any of them notified to be present, either in person or by attorneys; and this each plaintiff in error is ready to verify; and the recital therein contained, "On this day came again the said parties," is wholly false and untrue. Wherefore plaintiffs in error and your petitioners and each of them pray that the said record may be amended to conform with the truth and the fact, and that it may appear upon the face of the said record that at the time of the rendering of said judgment hereinbefore recited neither the plaintiffs in error or either or any of them nor their attorneys or any or either of them were present in court nor were they notified to be present; and this your petitioners will pray.

SAMUEL FIELDEN,
MICHAEL SCHWAB,
OSCAR W. NEEBE,
By W. P. BLACK AND
M. SALOMON,
Their Attorneys.

W. P. BLACK.
M. SALOMON.

35 The consideration of the motion was continued until the September term, 1888, when it was overruled.

At the March term, 1889, the parties, by their attorneys, moved for leave to amend the original motion, which amendment consisted of certain affidavits in support of the fact set forth in the original motion as the ground thereof. This motion was also overruled, and thereafter, at the same term of court, a motion was made by the attorneys of the parties to rehear the motion, which also was then denied; and the parties then, by their attorneys, prayed that they have leave to prepare and tender a bill of exceptions reciting the several motions so made and the rulings of this court thereon.

Opinion by Scholfield, J.

The purpose of the proposed amendment of the record, as we learn from the argument of counsel, is to make it appear by the record that these plaintiffs in error have been deprived of an important constitutional right—that of being present when this court rendered judgment affirming the judgment of the criminal court of Cook county—they contending that without their presence such judgment could not be pronounced. The effect which it is claimed will result from the proposed amendment is therefore in der*r*ogation of the judgment, as they contend, to nullify and destroy it. It must hence be manifest that this motion ought to have been made at the term at which that judgment was rendered; for, not having been made then, it can avail nothing as to Spies, Parsons, Lingg, Engel, and Fischer, and but for executive clemency, under which and not any judgment of court, Fielden and Schwab are now in the penitentiary, they could not cause the motion to be made.

36 Under our practice amendments of the record in affirmance of the judgment, when there is anything to amend by, may, upon notice, be made at a term subsequent to that at which final judgment is rendered; but amendments not in affirmance but in der*r*ogation of the judgment are not allowed at a term subsequent to that at which final judgment is rendered. Fl. Mill Co. *vs.* Mer. N. Bank, 97 Ills., 294; see also Powell on Appellate Proceedings, Appendix, p. 387, note 1. The amendment in Phillips *vs.* The People, 88 Ills., 161, was made before final judgment, and that in May *vs.* The People, 92 Ills., 346, was also before final judgment, and it was, moreover, in affirmance of the judgment. The other cases cited by counsel are less pertinent, and therefore demand no comment.

This motion, not having been made at the same term at which final judgment was rendered, nor until the case had passed beyond the power of this court to stay by its order the execution of the judgment, clearly becomes too late.

But it must not be understood that we concede that the amendment, if made, could have affected the validity of the judgment. In our opinion, the amendment, if made, would be inconsequential and would not affect in the slightest degree the rights of the parties under the judgment.

The common law required when any corporeal punishment was to be inflicted on the defendant that he should be personally present before the court at the time of pronouncing the sentence. 1st Chitty's Crim. Law (5th Am. Ed.), 693, 696.

Reasons given for this are that the defendant may be identified by the court as the real party adjudged to be punished (Holt, p. 399); that the defendant may have a chance to plead a pardon (3rd

More, 265); that he may have a pardon to plead or move in arrest
of judgment (King *vs.* Speke, 3d Salkeld, 358); that he may
37 have an opportunity to say what he can say why judgment
should be not given against him (2nd Hale's Pleas of the
Crown, 401–2), and that the example of the defendants who have been guilty of misdemeanors of a gross and public kind, being brought up for the animadversion of the court and the open denunciation of punishment, may tend to deter others from the commission of similar offence. 1st Chitty's Crim. Law (5 Am. Ed.), 693, 696.

It is manifest that none of these can apply to this court, because, 1st, it acts and decides only upon the record made in the court below. It can therefore have nothing to do with the question of the identity of the party whom the sheriff shall have in his custody for punishment, nor can it entertain a motion in arrest or a plea of pardon. And since its opinion is prepared and written out and filed with the clerk without being read from the bench, there is, when judgment or affirmance is given, no animadversion and open denunciation of punishment which could benefit bystanders. If the present plaintiffs in error and their counsel had been actually present in court when the judgment of affirmance here was entered the law allowed them to then say or do nothing which by any possibility could have benefitted plaintiffs in error. They were, after judgment was entered, entitled only to move for a rehearing, and this could only be done on printed petition; but thirty days were allowed in which to prepare it. 93 Ills., p. 11, rule 43.

Undoubtedly if plaintiffs in error or their counsel had been actually present in court when the decision was announced they would then have known what the decision was, but that fact was equally well made known to them by notice from the clerk, in am-
ple time to avail of their right to file a petition for rehearing.
38 And if, indeed, without any fault of theirs, more time would
have been needed within which to prepare the petition for
rehearing, it was within the recognized practice of this court to have extended the time for that purpose beyond the thirty days.

But no claim is here made that plaintiffs in error were not informed of the decision in the case in time to file a petition for rehearing. They did not seek to avail of that right, but voluntarily waived it and prosecuted a writ of error upon the record from the Supreme Court of the United States, and it was not until after that was decided adversely to them that they discovered the claimed error in the record of which amendment is now sought.

In The People *vs.* Clark, 1st Parker's Criminal R., 360, the supreme court of New York, at general term, held that on a writ of error brought to reverse a judgment in a capital case the personal attendance of the defendant on the argument or at the decision in the appellate court is not necessary to give such court jurisdiction. And there was like ruling in Donnelly *vs.* The State, 2nd Dutcher, 463; see also, in principle, to like effect Buhs *vs.* The State, 18 Mo., 318, and Com. *vs.* Costello, 121st Mass., 371.

We may add, moreover, it has not been the practice of this court, from its organization to the present time, to have the plaintiff in error in a criminal case actually present in court at the hearing and when final judgment is given, and it is clear from the different provisions of the statute that it not only does not provide for their presence, but it contemplates that they will not be present.

Thus, under division XV of our Criminal Code (R. S. 1874, p. 415), it is provided, in sec. 6, " When the court or judge is of opinion that the party obtaining such writ ought to be bailed until
39 the determination of the writ, and he is at the time in custody,
the said court or judge may make an order to admit such prisoner to bail upon his entering into a recognizance * * * conditioned that the prisoner will appear" (not in this court, as would be required were his presence here indispensable, but) " at the next term of court in which his trial took place and each subsequent term of said court, on the first days thereof, until the determination of such writ of error. * * *"

In sec. 7 it is provided, " If the prisoner is in custody of the sheriff he shall take the recognizance; if in custody of the warden of the penitentiary he shall take the recognizance. In either case the recognizance shall be returned to the next term of the court in which the prisoners was sentenced * * *;" and it is provided in sec. 11, " In case of the reversal of any judgment upon which any person has been committed to the penitentiary and the granting of a new trial by the supreme court, it shall be the duty of the warden of the penitentiary, upon receiving a certified copy of such judgment of the supreme court, to deliver the person so committed to the sheriff of the county where such new trial is to be had, &c." If such person were in court at the time the judgment is pronounced, and in custody, he would necessarily be in the custody of the sheriff of the county where this court is then being held, and the statute instead of providing, as thus quoted, would then have provided that the prisoner be delivered by the sheriff having him in custody to the sheriff of the county where such new trial is to be had.

We are not unmindful that it is guaranteed by sec. 9 of art. 2 of the constitution of this State that " in all criminal prosecutions the accused shall have the right to appear and defend in person
40 and by counsel, but it is clear, from the connection of the
clause, that this has reference to trials at *nisi prius* only. The entire paragraph reads thus: " In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation and to have a copy thereof, to meet the witnesses face to face, and to have process to compel the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county * * *." All of which rights these plaintiffs in error have fully enjoyed in the trial in the criminal court, resulting in their conviction; but they are not now defending against a prosecution; they are themselves prosecuting a suit to reverse the judgment by which they were convicted, and it is therefore impossible that these provisions can have any application to it. Tooke *vs.* The State (Texas, 3d Southwestern Reporter, 782).

The mere naming of the day on which the sentence was to be executed was but the exercise of a ministerial power which at common law was sometimes exercised by the sheriff (1st Chitty's Crim. Law, 5 Am. ed., p. 782 & 783), and is in this State exercised by the Governor in case of a temporary reprieve.

At common law a bill of exceptions could not be taken in case of a felony (1st Chitty's Crim. Law, 5th Am. ed., p. 622 & 623), and it is by our statute only authorized to be taken on trials at *nisi prius*. There is, in our opinion, no authority, either common law or statutory, authorizing this court or any member of it to sign a bill of exceptions.

The motions are overruled.

41 And afterwards, to wit, on the 16th day of May, A. D. 1889, certain proceedings were had by said court, among which is the following, viz:

To wit, May 16, 1889:

SAMUEL FIELDEN *et al.*
vs.
THE PEOPLE OF THE STATE OF ILLINOIS. } 1 P. D. Motion.

And now, on this day, the court having duly considered the motion of plaintiffs in error for leave to file an amendment to motion to correct judgment for a rehearing of said motion and for leave to take exceptions and file a bill of exceptions herein, and being now fully advised of and concerning the premises, overrule and deny said motions and each of them.

42 SAMUEL FIELDEN
vs.
THE PEOPLE OF THE STATE OF ILLINOIS. }

Petition for Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Illinois.

To the Honorable Simeon P. Shope, chief justice of the supreme court of the State of Illinois:

And now comes Samuel Fielden, by Moses Calomon, his attorney, and complains that in the record and proceedings, and also in the rendition of the final judgment, in a suit wherein your petitioner, Samuel Fielden, impleaded with August Spies, Michael Schwab, Albert R. Parsons, Adolph Fischer, George Engel, Louis Lingg, and Oscar W. Neebe, was plaintiff in error and the People of the State of Illinois were defendants in error, in the supreme court of the State of Illinois for the northern grand division, being the highest court of the State of Illinois in which a decision could be had in said suit, and in which the final judgment was rendered against him on the 16th day of May, A. D. 1889, where your petitioner specially set up and claimed certain rights, privileges, and immunities under and by virtue of the Constitution of the United

States, to wit, under and by virtue of the fourteenth amendment to the Constitution of the United States, and the proceedings therein and the decision thereof was adverse to and in denial of and against the right, privilege, immunity, and claim so specially set up and claimed by your petitioner, in the determination of which there is manifest error, to the great damage, wrong, and injury of your petitioner, as will fully appear from an inspection of said record in said supreme court of the State of Illinois remaining:

43 Wherefore your petitioner, Samuel Fielden, prays for the allowance of a writ of error herein and for such other process as is provided by law, to the end that the error aforesaid done the petitioner in and by the proceedings, judgment, and order of said supreme court of the State of Illinois in said cause may be corrected by the Supreme Court of the United States.

SAMUEL FIELDEN,
By M. SALOMON,
His Attorney.

The prayer of the foregoing petition is allowed.

S. P. SHOPE,
Chief Justice Supreme Court of Illinois.

(Endorsed:) Filed Feb'y 6th, 1890. A. H. Taylor, clerk.

44 SHOPE, *Chief Justice:*

Samuel Fielden presents to the chief justice of the supreme court of the State of Illinois a petition praying the allowance of a writ of error from the Supreme Court of the United States to the supreme court of the State of Illinois to reverse a judgment entered by the latter court in the case of Fielden *et al. vs.* The People on May 16, 1889. Accompanying such petition is a transcript of the record and proceedings made and entered in the State supreme court, of which the following is a brief abstract:

At the March term, 1888, of the State supreme court petitioner and others moved the court to amend the record of a judgment entered therein on September 14th, being one of the days of the September term, 1887, in the case of Spies *et al. vs.* The People, pending on error to the criminal court of Cook county, by striking out the recital in the record that "on this day came again the said parties," etc., and to so change and alter the record as that it should appear on the face thereof that at the time the judgment in that case was rendered the plaintiffs in error nor any nor either of them were in fact present in that court. The consideration of this motion was continued to the September term, 1888, of the court, when it was overruled. At the March term, 1889, the parties moved for leave to amend their original motion, and supported the same by certain affidavits, showing that the plaintiffs in error in the case of Spies *et al. vs.* The People were not, nor were any or either of them, personally present when the final judgment in that case was entered. This motion was also overruled; and thereafter, at the same term of court,

a rehearing of such motion was prayed for and denied. Leave
45 was then asked to tender a bill of exceptions embodying the
several motions, affidavits, and rulings of the court thereon, which was also denied; and the opinion of the court, by Scholfield, J., was filed and the judgment of the court entered on May 16, 1889. Fielden *et al. vs.* The People, 128 Ill., 595.

It was stated in that opinion that the purpose of the proposed amendment of the record, as was learned from the argument of counsel, was to make it appear by the record that the plaintiffs in error in the case of Spies *et al. vs.* The People had been deprived of an important constitutional right—that of being present when the court rendered final judgment affirming the judgment of the criminal court of Cook county—contending that without their presence such judgment could not be pronounced; and the decision of the court was placed upon two grounds: First, that, as insisted by plaintiffs in error, if the amendment was made and the right to be present existed the amendment would be in derogation of the judgment, and that, as the motion was not made until a term of court subsequent to the term when the judgment was rendered, the court had lost jurisdiction; and, second, that the right to be present in the appellate court did not exist, and therefore the amendment, if made, would be inconsequential and would not affect the rights of the parties to the judgment.

The record presented with this petition relates solely to the proceedings and judgment of the State supreme court had and entered subsequent to the original judgment, and the granting of the writ here prayed for can only bring up for review in the Federal court, should its jurisdiction be sustained, the single question of the right of the petitioner to have the record of the original judgment amended
at the time his application therefor was made.

46 The authority of the chief justice of the State court to
allow a writ of error, as here asked, is given by section 999 of the Revised Statutes of the United States, where it is provided that when the writ "is issued by the Supreme Court to a State court the citation shall be signed by the chief justice or judge or chancellor of such court rendering the judgment or passing the decree complained of," and the cases in which the writ may be so allowed and the appellate jurisdiction of the Supreme Court of the United States exercised are defined in section 709 of the same statutes. They are:

"A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision is against their validity, or where is drawn in question the validity of a statute of or an authority exercised under any State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision is in favor of their validity, or where any title, right, privilege, or immunity is claimed under the Constitution or any treaty or statute of or commission held or authority exercised under the United States and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error."

When therefore the chief justice is moved to act, by the presentation of a record and proper petition, he is called upon to determine, in the first instance, by inspection of the record presented,
47 whether in the rendition of the judgment complained of
there was involved any denial or abridgment of any title, right, privilege, or immunity secured to the petitioner by the Constitution and laws of the United States—that is to say, that some one of the questions mentioned in the act before referred to was raised and presented to the State court, and that the decision of the court, in terms or by implication, necessarily operated as a denial of the right or immunity claimed by the petitioner. Jenkins *v.* Lowenthal, 110 U. S., 222; Bonapart *vs.* App. Court, 104 U. S., 592.

The question presented to the Chief Justice in such case is, not whether the judgment complained of was correct—that is the question to be considered by the Federal court, if its appellate jurisdiction is sustained—but whether the record discloses that a claim of title, right, privilege, or immunity secured to the petitioner by the Constitution and laws of the United States was presented to the State court and by that court decided adverse to such claimed right or immunity. It was said in Twitchell *vs.* The Commonwealth, 7 Wall., 324, that "in general, the allowance (of the writ) will be made where the decision appears to have involved a question within" the appellate jurisdiction of the Supreme Court of the United States.

Nor does the allowance of the writ at all imply that the officer granting it is of opinion that the petitioner is entitled to be heard in the Federal court. Mr. Chief Justice Taney, in Callan *vs.* May, 2 Black, 543, in delivering the opinion of the court, said: "Writs of error to State courts cannot issue without the *allocatur* of a judge of this court." Yet there is hardly a term in which a case of this description has not been dismissed upon the ground that the
48 transcript did not show a case in which a writ of error would
lie.

"And it does not by any means follow that the judge who authorized the appeal has made up his mind that the party is entitled to it. He may, and no doubt does, entertain doubts upon the subject, or may regard the point as new and undecided, upon which different opinions may be entertained, and in such cases he grants the appeal to bring the matter before the court and enable it to decide for itself whether the case is or is not within the appellate jurisdiction as regulated by Congress." Indeed, the rule would seem to be settled that if the question of the jurisdiction of the Federal court be doubtful the judge to whom the application is made may, in his discretion, and, furthermore, ought to, issue the citation, leaving the question to be determined by the Supreme Court of the United States on the record brought before it. Murdock *vs.* Memphis, 20 Wall., 632; Mr. Chief Justice Field in Hart *vs.* Burnett, 20 Cala., 107.

Upon the motion to amend the record, before stated, it was insisted by counsel for petitioners that the condition of the record, which was alleged to be untrue in fact, prevented them from raising the question of their right to be present at the time final judgment was rendered against them in the State supreme court, and that the right to be so present was secured to them by the Constitution of the United States. Some force is given this contention when the language employed by the Chief Justice of the Supreme Court of the United States in the principal case of Spies *et al. vs.* The People, 123 U. S., 131, is considered. There it was said, "The objection that the defendants were not actually present in the supreme court of the State at the time sentence was pronounced cannot be made on the record
49 as it now stands, because on its face it shows they were
present. If this is not in accordance with the fact the record must be corrected below, not here. It will be time enough to consider whether the objection presents a Federal question when the correction has been made." And it can hardly be doubted that the language quoted, uttered as it was after the adjournment of the term of the State supreme court, was used in contemplation that an amendment of the record of the supreme court of this State could thereafter be made. But, however this may be, it is manifest that the denial by the State court to make the amendment would present a Federal question if the record, when amended, would do so, unless in some way the party had lost the right to have the amendment made or the court had lost the power to make it.

As has been seen, the State court decided, in the case shown by this record, not only that the court had lost jurisdiction to amend its record, as insisted, in derogation of its former judgment, but that the right to be present, as claimed, did not exist.

It is clear, therefore, that the right claimed by petitioners to be present in the State supreme court when final judgment was entered in the case pending therein on error to the criminal court of Cook county was denied; and it is apparent that the refusal of the court to amend the record so as to show that defendants were not in fact present would, in view of the action of the Supreme Court of the United States upon the record when it was before that court and of the supreme court of this State, forever bar the parties from presenting the question of their right to be so present to any tribunal.

While I am of opinion that the motion to amend the rec-
50 ord and the subsequent motion to amend that motion and
the petition for rehearing of the motion have been correctly decided by the State supreme court, I am not prepared to say that it is free from doubt, when the language of the Supreme Court of the United States before quoted is considered, that a Federal question is not here involved, for it seems to me that the court would not have used the language it did, after full argument before it, if, in its opinion, there had been no question as to the right claimed. If a Federal question be involved it is clearly my duty to allow the writ; if not involved, to refuse it; and if it be doubtful, then under all the authorities I ought not to deny to the petitioners the right and opportunity to have the question of its jurisdiction determined by

the Federal court. Especially should this rule be adopted where the life or the liberty of the citizen is involved and the judge to whom application is made is asked to afford opportunity for the correction of alleged errors.

Upon consultation with a majorty of my brethren, I have determined to allow the writ; and the petitioner having tendered bond for costs in the sum of $500, with Frank A. Stauber as surety, conditioned as provided by law, the bond and security are approved and the writ is allowed, without bail.

(Endorsed:) Filed Feb'y 6th, 1890. A. H. Taylor, clerk.

51 Know all men by these presents that we, Samuel Fielden and Frank A. Stauber, are held and firmly bound unto The People of the State of Illinois in the full sum of five hundred dollars, to be paid to the said People of the State of Illinois, — certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 3rd day of December, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas lately, at a session of the supreme court of the State of Illinois in and for the northern grand division, in a suit depending in said court between Samuel Fielden, impleaded, plaintiff, and The People of the State of Illinois, defendant-, a final judgment was rendered against the said Samuel Fielden, and the said Samuel Fielden having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the said judgment in the aforesaid suit, and a citation directed to the said People of the State of Illinois, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Samuel Fielden shall prosecute his writ of error to effect and answer all damages and costs if he fail to make his plea
52 good, then the above obligation to be void; else to remain in full force and virtue.

SAMUEL FIELDEN, [SEAL.]
By M. SALOMON, *His Attorney.*
FRANK A. STAUDER. [SEAL.]

Sealed and delivered in presence of—
M. SALOMON.

Approved by S. P. Shope, chief justice of the supreme court of Ills.

STATE OF ILLINOIS, *Cook County*, } *ss:*

Frank Stauber solemnly, sincerely, and truly affirms and declares that he resides at 718 Michigan Ave., in the city of Chicago; that he signed and executed the within bond and for the purposes therein mentioned; that he is owner in fee simple and the title thereof is in his name of the property situated at 724 Milwaukee Ave., in the city of Chicago, county of Cook aforesaid; that said property consists of the real estate and per- improvements thereon and is of the value of seven (7) thousand dollars, subject to an incumbrance of three thousand dollars; that he is worth at least five (5) thousand dollars above his liabilities and obligations; and further he said not.

FRANK A. STAUBER.

Subscribed and affirmed before me by the said Frank Stauber this 3rd day of December, A. D. 1889.

[NOTARIAL SEAL.] THOMAS W. PRINDIVILLE,
Notary Public.

(Endorsed:) Filed Feb'y 6th, 1890. A. H. Taylor, clerk.

53 SAMUEL FIELDEN
vs.
THE PEOPLE, etc.

Writ of error from the Supreme Court of the United States to the supreme court of Illinois.

Stipulation.

It is hereby stipulated and agreed by the plaintiff- in error and defendant in error that at the September term, 1887, of the supreme court of the State of Illinois the case of Samuel Fielden *et al. vs.* The People of the State of Illinois was pending in said supreme court on error to the criminal court of Cook county, the said court then and there having jurisdiction thereof, made and entered of record the following judgment in said cause, to wit:

In the Supreme Court of the State of Illinois, Northern Grand Division. September Term, A. D. 1887.

AUGUST SPIES, MICHAEL SCHWAB, SAMUEL Fielden, Albert R. Parsons, Adolph Fischer, George Engel, Louis Lingg, and Oscar W. Neebe
vs.
THE PEOPLE OF THE STATE OF ILLINOIS.
Error to the Criminal Court of Cook County.

"On this day came again the said parties, and the court having diligently examined and inspected as well the records and proceedings aforesaid and the matters and things therein assigned for error;
and being now sufficiently advised of and concerning the prem-
54 ises, for that it appears to the court now here that neither
in the record or proceedings aforesaid nor in the rendition
of the judgment aforesaid is there anything erroneous, vicious, or
defective, and that that record is no error, therefore it is considered

by the court that the judgment aforesaid be affirmed in all things as to each and every of said plaintiffs in error and stand in full force and effect, notwithstanding the said matters and things therein assigned for error; and it is further ordered by the court that the 11th day of November, A. D. 1887, be, and the same is hereby, fixed as the time when the sentence of death pronounced upon said plaintiffs in error, August Spies, Michael Schwab, Samuel Fielden, Albert R. Parsons, Adolph Fischer, George Engel, and Louis Lingg, by the criminal court of Cook county, Illinois, shall be executed; and is further ordered by the court that the sheriff of Cook county, Illinois, be, and he is hereby, ordered and directed to carry into execution the sentence by the criminal court of Cook county, Illinois, of the defendants in the indictment, August Spies, Michael Schwab, Samuel Fielden, Albert R. Parsons, Adolph Fischer, George Engel, and Louis Lingg, on Friday, the 11th day of November next (November 11th, A. D. 1887), between the hours of ten o'clock in the forenoon and four o'clock in the afternoon of that day; and it is further considered by the court that the said defendants in error recover of and from the said plaintiffs in error their costs by them in this behalf expended, and that they have execution therefor."

55 It is further stipulated that the said supreme court adjourned for the September term thereof on the 26th day of September, 1887, until court in course, and that at the March term, 1888, of said court a motion was filed therein to amend the record aforesaid, upon which motion proceedings were subsequently had; all of which, as well the said motion as the proceedings subsequently had relating thereto, will more fully appear by the transcript of the record herein; and as the question sought to be raised upon this writ of error relates to the orders of said supreme court at and subsequent to the March term, 1888, refusing to amend the record aforesaid, only the record made at and subsequent to said March term of said court, together with this stipulation, embracing the transcript of the judgment as herein set forth, shall be included in the transcript of the record to be filed in this cause, and the certificate of the clerk of the supreme court of the State of Illinois that the transcript is a full, true, and correct transcript of the record of proceedings at and subsequent to the March term, 1888, shall be a sufficient certificate.

M. SALOMON,
Att'y for Plaintiff in Error, Samuel Fielden.
GEO. HUNT,
Attorney General, for the People of the State of Illinois.

[Endorsed:] The within stipulation filed Feb'y 6th, 1890. A. H. Taylor, clerk.

56 UNITED STATES OF AMERICA:

In the Supreme Court of the United States of America. October Term, A. D. 1890.

SAMUEL FIELDEN, Plaintiff in Error, *vs.* THE PEOPLE OF THE STATE OF ILLINOIS, Defendants in Error.	Error to the Supreme Court of the State of Illinois, Sitting in and for the Northern Grand Division.

Assignment of Errors.

And now comes Samuel Fielden, plaintiff in error, in his own proper person and by his attornies, Benjamin F. Butler and Moses Salomon, and complains and says that in the record and proceedings and also in the rendition of the final judgment in a suit wherein Samuel Fielden, impleaded with others, was plaintiff in error and the People of the State of Illinois were defendants in error, in the supreme court of the State of Illinois for the northern grand division thereof, being the highest court of said State in which a decision in said suit could be had, and in which a final judgment was
57 rendered against him, plaintiff in error, on the 16th day of May, A. D. 1889, wherein a title, rights, privileges, and immunities were claimed under the Constitution of the United States and the decision of the supreme court of Illinois was against the rights, privileges, and immunities specially set up and claimed by the plaintiff in error under the Constitution, treaties, and statutes of the United States, in the determination of which there was manifest and material errors, and plaintiff in error prays to have the judgment of the supreme court of Illinois in and for the northern grand division thereof in this behalf reversed and set aside and held for nought.

Plaintiff in error further says that the action of said supreme court of the State of Illinois was erroneous in the following particulars, to wit:

I.

Said supreme court of the State of Illinois erred in overruling and denying the motion and request of the plaintiff in error to amend the record as filed in the said supreme court on the 5th day of March, A. D. 1888, and again on the 22nd day of March, A. D. 1888.

II.

Said supreme court erred in overruling the motion and refusing the request of the plaintiff in error filed the 26th day of March, A. D. 1889.

III.

Said supreme court of the State of Illinois erred in refusing the

motion and denying the request of the plaintiff in error to
58 amend said record, then and now remaining in said supreme
court, as entered on the 14th day of September, A. D. 1887,
said record as entered on the 14th day of September, A. D. 1887, in said cause wherein plaintiff in error was impleaded as plaintiff in error together with August Spies *et al.* and The People of the State of Illinois were defendants in error, said record reciting, "On this day came again the said parties," meaning and intending thereby that this plaintiff in error, together with his coplaintiffs in error, was personally and bodily present in said supreme court when said judgment and order to inflict the punishment of death was pronounced by said supreme court and entered of record, whereas in truth and in fact plaintiff in error was not actually bodily present or represented by attorney in said court when said judgment and order was pronounced, as appears from the affidavits filed in said court, which affidavits were not denied or questioned and stand uncontradicted in said cause in support of said motions, and also from the opinion of the court therein and the action of said court in denying the motion and refusing the request of plaintiff in error to amend the said record so as to show the truth and the fact that plaintiff in error was not present when said sentence was pronounced against him, plaintiff in error, and entered of record by said supreme court, is in violation of the laws and Constitution of the United States and contrary to the laws and constitution of the State of Illinois; and plaintiff in
error states that by a uniform current of decisions of the su-
59 preme court of the State of Illinois aforesaid it is the settled
law of the State of Illinois, and said law was at the time of the making of said motions and the decision of said court in full force and effect, and the State of Illinois has granted to all other persons making a demand similar and insisting upon the protection of the law similar or identical to that demanded or requested by plaintiff in error and denied to the plaintiff in error.

IV.

Said supreme court of the State of Illinois erred in denying the motions and requests of plaintiff in error, as shown in the foregoing record, to amend and alter the entry made on the record of said supreme court on the 14th day of September, A. D. 1887, wherein and whereby it is made to appear that plaintiff in error was personally and bodily present when said sentence of death was pronounced by said supreme court, when in truth and in fact plaintiff in error was not personally and bodily present in said supreme court when said sentence of death was pronounced against plaintiff in error, as appears from the uncontradicted affidavits filed in support of said motions, and as was also well known to the personal knowledge of the judges of said supreme court presiding at the time said sentence of death was pronounced and who composed the court on said 14th day of September, A. D. 1887, at the time said motions of plaintiff in error were overruled, as appears from the record hereinbefore set forth; that said action of said supreme court in refusing and denying the motions to amend the record as requested by plaintiff 60 in error was in violation of the Constitution of the United States, and also in violation of the laws and constitution of the State of Illinois, it being provided by the Statute of Illinois, chapter 37, section 15: "Whenever any judgment shall have been rendered in the supreme court which, upon further consideration, it is found to be erroneously entered up, the judges thereof are authorized during vacation to change the same without ordering a rehearing thereof and entering a proper judgment in said cause, and in case a *procedendo* shall have been issued, in such case the judges may recall the same, and by order of any of the judges all proceedings taken by rreason of such *procedendo* shall be vacated and set aside, provided that all such judgments shall be corrected within six months from the adjournment of the term at which they may have been entered;" which said statute still remains unrepealed and in full force and effect; and plaintiff in error further says that it appears from the record hereinabove that said motion to amend the record was made within six months from the adjournment of the term at which said judgment was rendered.

V.

Said supreme court of Illinois erred in matter of fact in causing it to be recorded that plaintiff in error was personally and bodily present in said supreme court of Illinois at the time said sentence of the 14th day of September, A. D. 1887, was entered of record, as the judges of said supreme court of Illinois had personal knowledge of the fact that plaintiff in error was not personally and bodily present in said supreme court of Illinois at the time said sentence of 61 death was pronounced by said supreme court of Illinois, and it is not stated or claimed by the judges of said supreme court of Illinois in their judgment and opinion overruling the motions of plaintiff in error to amend said record as aforesaid that in truth and in fact the plaintiff in error was personally and bodily present in said supreme court of Illinois at the time said sentence of death of the 14th day of September, A. D. 1887, was pronounced, and the said sentence of death pronounced by said court was in derrogation of and denial of the rights, privileges, and immunities secured to plaintiff in error by the Constitution and laws of the United States and of the State of Illinois.

VI.

Said supreme court of the State of Illinois erred in pronouncing sentence of death on the 14th day of September, A. D. 1887, therein and thereby directing and ordering to be inflicted upon plaintiff in error the penalty of death, as said court was without jurisdiction of the person of plaintiff in error, and said sentence of death was therefore null and void.

VII.

Said supreme court of the State of Illinois erred in pronouncing said sentence of death recorded as of the 14th day of September,

A. D. 1887, therein and thereby ordering and directing the infliction of the penalty of death upon the plaintiff in error, he not being then and there bodily present nor notified to be then and there present, and the action of said court was in violation of the
62 Constitution and laws of the United States and of the State of Illinois.

VIII.

Said supreme court of Illinois erred in pronouncing said sentence of death, directing and ordering the infliction of the penalty of death upon plaintiff in error in his absence and without notice to him or his attorneys to be present on said day when said supreme court pronounced said sentence of death and without issuing process to bring in the plaintiff in error then and there to be present at the time of said sentence, and said action of the court is in violation of and a denial of and in contravention of the Constitution, treaties, and laws of the United States and of the State of Illinois.

IX.

Plaintiff in error further assigns as error that having the right, privilege, and immunity secured to him by the Constitution and laws of the United States and of the State of Illinois to have been present at the time said sentence of death was pronounced, so that he might show cause, if any he had, why the sentence of death should not be pronounced against him, and it was further his right and privilege to have the inquiry made of him then and there why the sentence of death should not be passed upon him, and an opportunity should have been given him to state his reason why sentence of death should not have been passed upon him, that the same privilege was not granted.

X.

Said supreme court of Illinois erred in causing it to be recited and appear on the record of said court that petitioner was
63 personally and bodily present in said supreme court on the 14th day of September, A. D. 1887, and in pronouncing sentence of death, ordering and directing the infliction of the penalty of death upon plaintiff in error in his absence and without notice or process to him or his attorney to appear in said court then and there, which action of said court is in violation and denial of the rights, privileges, and immunities of plaintiff in error secured to him under and by virtue of the laws, treaties, and Constitution of the United States and of the State of Illinois.

XI.

That there is other manifest and material errors in said record.

Wherefore plaintiff in error prays that the judgment of said supreme court denying and overruling the motions of the plaintiff in error to amend said record of said court, and also the sentence of death pronounced by said court, directing and ordering the infliction of the penalty of death upon plaintiff in error of the 14th day of September, A. D. 1887, in his absence and without notice or process to him to then and there appear, may be reversed, set aside, and held for naught; and this plaintiff in error will ever pray.

M. SALOMON,
Attorney for Plaintiff in Error.

BENJ. F. BUTLER,
Of Counsel.

Endorsed on cover: Illinois supreme court. No. 1468. Samuel Fielden, plaintiff in error, *vs.* The People of the State of Illinois. Filed October 18, 1890.

Office Supreme Court U. S.
FILED.
OCT 5 1891
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1891.

SAMUEL FIELDEN,
Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error.

No. 909.
In error to the Supreme Court of the State of Illinois.

MICHAEL SCHWAB,
Appellant,
vs.
A. W. BERGGREN, Warden of the Penitentiary of the State of Illinois, at Joliet,
Appellee.

No. 977.
Appeal from Circuit Court of United States for the Northern District of Illinois.

MOTION TO ADVANCE AND SET FOR HEARING.

BENJ. F. BUTLER AND
MOSES SALOMON,
COUNSEL FOR PLAINTIFF IN ERROR, SAMUEL FIELDEN, AND APPELLANT, MICHAEL SCHWAB.

UNITED STATES
OF
AMERICA. } SS.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1891.

SAMUEL FIELDEN, *Plaintiff in Error,* *vs.* THE PEOPLE OF THE STATE OF ILLINOIS, *Defendant in Error.*	*No. 909.* *In error to the Supreme Court of the State of Illinois.*
MICHAEL SCHWAB, *Appellant,* *vs.* A. W. BERGGREN, Warden of the Penitentiary of the State of Illinois, at Joliet, *Appellee.*	*No. 977.* *Appeal from Circuit Court of United States for the Northern District of Illinois.*

NOTICE OF MOTION TO ADVANCE AND SET ABOVE CAUSES FOR HEARING.

To the Honorable George Hunt, Attorney General of the State of Illinois.

DEAR SIR: You are hereby notified that we, the undersigned counsel for plaintiff in error, Samuel Fielden, and for appellant, Michael Schwab, will, before the Supreme court at Washington, on October 12th, A. D. 1891, at the opening of court, or as soon thereafter as counsel may be heard, move the court to advance said causes upon the docket of said court for hearing, on a day as early as may be, and also that both of said causes be set down for hearing on the same day; a copy of which motion and a copy of the affidavit in support thereof is hereby given you, at which time and place you can appear, if you see fit.

Yours respectfully,
Benj. F. Butler and
M. Salomon,
Counsel for Plaintiff in error, Samuel Fielden, and Appellant, Michael Schwab.

Received a copy of the foregoing notice of motion, also of the motion and affidavit attached, September 21, 1891.

Geo. Hunt,
Atty. for Defendant in Error and Appellee.

United States of America. } ss.

In the Supreme Court of the United States,
October Term, A. D. 1891.

Samuel Fielden, *Plaintiff in Error*, *vs.* The People of the State of Illinois, *Defendant in Error.*	*No. 909. In error to the Supreme Court of the State of Illinois.*
Michael Schwab, *Appellant*, *vs.* A. W. Berggren, Warden of the Penitentiary of the State of Illinois, at Joliet, *Appellee.*	*No. 977. Appeal from Circuit Court of United States for the Northern District of Illinois.*

Motion to Advance and set for Hearing.

And now comes the plaintiff in error, Samuel Fielden, and the appellant, Michael Schwab, by Benj. F. Butler and M.

Salomon, their counsel, and move the court that the above entitled causes be advanced upon the docket of this court, and that said causes be set down for hearing at an early day, to be fixed by this court, and further, move the court that the above entitled causes be set for hearing on the same day, as provided by law, and in accordance with the rules of this court, for the following reasons:

First. Case No. 909 is a writ of error allowed by the chief justice of the Supreme court of the State of Illinois to the Supreme court of the State of Illinois, in a criminal case.

Second. Case No. 977 is a criminal case wherein the appellant, Michael Schwab, on, to wit: the 25th day of September, 1890, presented his petition for a *habeas corpus* to the Circuit court of the United States, for the Northern District of Illinois, to be relieved from imprisonment in the penitentiary of the State of Illinois, in violation of the Constitution of the United States, but the said court denied the prayer of said petition, and declined to issue the writ of *habeas corpus*, from which order the petitioner, Michael Schwab, prayed an appeal to the Supreme court of the United States, which appeal was duly allowed by said Circuit court.

Third. In a certain case in the Supreme court of the State of Illinois, wherein plaintiff in error, Samuel Fielden, was impleaded, together with Michael Schwab, the appellant herein, and others, as plaintiff in error, and the People of the State of Illinois were defendant in error, on the 14th day of September, A. D. 1887, when they were not present, judgment and sentence of death was by the Supreme court of the State of Illinois pronounced against Samuel Fielden and Michael Schwab, that they be executed on the 11th day of November, 1887, and that on the 10th day of November, A. D. 1887, the sentences were commuted by the Governor of the State of Illinois to imprisonment in the penitentiary for life.

Fourth. Plaintiff in error and the appellant both are now confined in the penitentiary at Joliet, and kept at hard labor.

Fifth. That the record of the Supreme court of the State of Illinois, contrary to the fact that the plaintiff in error, Samuel Fielden, and the appellant, Michael Schwab, were not present in court at the time judgment and sentence of death was pronounced against them, recites that they were present. That the plaiatiff in error, Samuel Fielden, and the appellant, Michael Schwab, moved the Supreme court of the State of Illinois, to amend the record, so as to show the fact that the plaintiff in error and appellant were not present at the time the judgment and sentence of death was passed upon them, but the said Supreme court denied the motion of plaintiff in error, Samuel Fielden, and appellant, Michael Schwab, and refused to amend the said record.

And this the plaintiff in error, Samuel Fielden, and the appellant, Michael Schwab, will ever pray.

Respectfully submitted.

Benj. F. Butler and
M. Salomon,
Counsel for Plaintiff in Error, Samuel Fielden, and
Appellant, Michael Schwab.

UNITED STATES OF AMERICA. } SS.

IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, A. D. 1891.

SAMUEL FIELDEN, *Plaintiff in Error,* *vs.* THE PEOPLE OF THE STATE OF ILLINOIS, *Defendant in Error.*	*No. 909.* *In error to the Supreme Court of the State of Illinois.*
MICHAEL SCHWAB, *Appellant.* *vs.* A. W. BERGGREN, Warden of the Penitentiary of the State of Illinois, at Joliet, *Appellee.*	*No. 977.* *Appeal from Circuit Court of United States for the Northern District of Illinois.*

MOSES SALOMON, being first duly sworn, on oath deposes and says, that he is of counsel for plaintiff in error, Samuel Fielden, and the appellant, Michael Schwab.

Affiant further says, that both said Samuel Fielden and said Michael Schwab are now confined and kept at hard labor in the penitentiary at Joliet, in the State of Illinois, and further affiant saith not.

MOSES SALOMON.

Subscribed and sworn to by Moses Salomon, before me, this 24th day of September, A. D. 1891.

Seal.
Edward J. Walsh,
Notary Public,
Cook County.

EDWARD J. WALSH,
Notary Public.

Office Supreme Court U. S.
FILED,
JAN 2 1892
JAMES H. McKENNEY,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1891.

SAMUEL FIELDEN,
Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error.

No. 909.

Writ of Error to the Supreme Court of the State of Illinois.

MICHAEL SCHWAB,
Appellant,
vs.
A. W. BERGGREN, WARDEN OF THE PENITENTIARY OF THE STATE OF ILLINOIS AT JOLIET,
Appellee.

No. 977.

Appeal from the Circuit Court of the United States for the Northern District of the State of Illinois.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR AND APPELLANT.

BENJ. F. BUTLER AND
M. SALOMON,
COUNSEL FOR PLAINTIFF IN ERROR AND APPELLANT.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1891.

SAMUEL FIELDEN, *Plaintiff in Error,* *vs.* THE PEOPLE OF THE STATE OF ILLINOIS, *Defendant in Error.*	**No. 909.** Writ of Error to the Supreme Court of the State of Illinois.
MICHAEL SCHWAB, *Appellant,* *vs.* A. W. BERGGREN, WARDEN OF THE PENITENTIARY OF THE STATE OF ILLINOIS AT JOLIET, *Appellee.*	**No. 977.** Appeal from the Circuit Court of the United States for the Northern District of the State of Illinois.

STATEMENT OF CASES.

MAY IT PLEASE THE COURT:

The plaintiff in error, Samuel Fielden and the appellant, Michael Schwab, the former a subject of the British Empire and the latter a subject of the Emperor of Germany, were, together with others, put upon trial in the Criminal court of Cook county, State of Illinois. Thereafter on the 9th day of October, 1886, a judgment and sentence of death was pronounced against said Fielden and Schwab, the time for their execution being fixed on the 3d day of December, A. D. 1886. The cause was removed by writ of error to, and remained in the Supreme court of the State of Illinois until on or about the 14th day of September, 1887. The time for the enforcement of the original sentence having expired, without its having been put in force, the Supreme court of the State of Illinois on the last mentioned date pronounced a judgment and sentence of death against said Fielden and Schwab, they not being present, the said last mentioned sentence of death was ordered by the court to be put into effect on the 11th day of November, 1887, during all which time from the date of their arrest, which was on the 7th day of May, A. D. 1886, said Fielden and Schwab remained confined in the county jail of Cook county, situated in the city of Chicago, county of Cook, State of Illinois.

On the 10th day of November, 1887, being the day preceding the date fixed for the execution of said Schwab and Fielden, the Governor of the State of Illinois issued a commutation of the sentence imposed upon said Schwab and Fielden, and directed therein that they, said Schwab and Fielden, be confined in the penitentiary for life. Schwab and Fielden were thereafter, on the 12th day of November, 1887, by Canute R. Matson, sheriff of Cook county, taken to the penitentiary at Joliet, in the county of Will, State of Illinois, and delivered into the care and keeping of the warden of the penitentiary at Joliet on the same day, and now said warden of the penitentiary at Joliet keeps in confinement and at hard labor in that penitentiary the said Schwab and said Fielden. As his authority for his acts the warden exhibits papers consisting of:

First. The judgment and sentence of death imposed on Fielden and Schwab by the Criminal court of Cook county, on the 9th day of October, 1886.

Second. The judgment and sentence of death imposed on Fielden and Schwab by the Supreme court of the State of Illinois on the 14th day of September, A. D. 1887.

Third. The commutation paper issued by the Governor of Illinois, under the seal of State.

Fourth. A letter from R. G. Oglesby to R. W. McCloughry, warden of the Illinois State Penitentiary, at Joliet, Illinois.

On the 21st day of October, 1887, application was made to this court for the allowance of a writ of error to the Supreme court of the State of Illinois. The application having been argued this court decided the same and dismissed the application. In the opinion given by this court it was stated in *Spies* v. *People*, 123 U. S., 131, opinion by WAITE, Chief Justice.

In answer to the contention of counsel for the petitioners who claimed that the petitioners applying for the writ of error were about to be deprived of their lives, in violation of the Constitution of the United States, especially in violation of the provision providing for due process of law, in that they were not present in the Supreme court on the 14th day of September, A. D. 1887, when judgment and sentence of death was pronounced upon them, by the said last mentioned court. "The objection that the defendants were not actually present in the Supreme court of the state at the time sentence was pronounced cannot be made on the record as it now stands, because on its face it shows that they were present.

If this is not in accordance with the fact the record must be corrected below, not here. It will be time enough to consider whether the objection presents a federal question when the correction has been made."

In accordance with the suggestion of this court, and as was the right of Fielden and Schwab, they, on the 5th day of March, 1888, it being the earliest opportunity, no session of court having been held in the district until then, moved the said Supreme court to correct the entry on the record as to their presence when sentence of death was pronounced against them, so as to show the fact that they were not actually present at said time. This motion was not finally determined until the 16th day of May, 1889, when the Supreme court of the state overruled the motion and refused to amend the record. (Page 18 of Fielden record.)

These causes are brought before this court in the case of Samuel Fielden by a writ of error to the Supreme court of the State of Illinois, the writ being allowed by the Chief Justice of the Supreme court of the State of Illinois, and in the case of Michael Schwab on appeal from an order entered by the Circuit court of the United States for the Northern District of Illinois, refusing to issue a writ of habeas corpus on the petition of the appellant, Michael Schwab, and sustaining the demurrer to the petition of the warden of the penitentiary, filed by the attorney general.

The above stated facts all appear from the transcripts of the several records in the respective cases. As the records are brief, no abstract of the same is made.

STATEMENT OF POINTS.

As the points involved in the Schwab case and Fielden case are in many respects similar, save as to the different courts, and an adjudication or determination of those in one of the two cases will be conclusive as to some of the points involved in the other case, we have thought it best both for the convenience of the court and the counsel to present the points involved in but one brief. In considering the cases therefore, we present first the assignments of errors in the respective cases, and second a condensed and brief statement of points relied upon by the parties to these cases for a reversal, and which the respective assignment of errors substantially include.

The assignment of errors in Fielden's case being as follows:

ASSIGNMENT OF ERRORS.

I.

Said Supreme court of the State of Illinois erred in overruling and denying the motion and request of the plaintiff in error to amend the record as filed in the said Supreme court on the 5th day of March, A. D. 1888, and again on the 22d day of March, A. D. 1888.

II.

Said Supreme court erred in overruling the motion and refusing the request of the plaintiff in error, filed the 26th day of March, A. D. 1889.

III.

The Supreme court of Illinois erred in refusing the motion and denying the motion of the plaintiff in error to amend said record, then and now remaining in said Supreme court, as entered on the 14th day of September, A. D. 1887, in said cause wherein the plaintiff in error was impeaded as plaintiff in error together with August Spies *et al.*, and the people of the State of Illinois were defendants in error, said record reciting, "on this day "came again the said parties," meaning and intending thereby that this plaintiff in error, together with the co-plaintiffs in error, was personally and bodily present in said Supreme court when said judgment to inflict the punishment of death was pronounced upon them by said Supreme court and entered of record, according to the truth and facts; because in truth and in fact plaintiff in error was not actually bodily present or represented by attorney present in said court when said judgment and sentence was pronounced, as appears from the affidavits filed in said court, which affidavits were not denied or questioned, and stand uncontradicted in said cause in support of said motions, and also from the opinion of the court therein and are admitted now so to be.

The action of said court in denying the motion and refusing to allow the same of plaintiff in error to amend the said record, so as to show the truth and the fact that plaintiff in error was not present when said sentence was pronounced against him, plaintiff in error, and entered of record by said Supreme court, is in violation of the Constitution of the United States and contrary to the laws and constitution of the State of Illinois.

And plaintiff in error avers that by a uniform current of decisions of the Supreme court of the State of Illinois, it is the settled law of that state, and said law was at the time of the making of said motions and the decision of said court in full force and effect, and courts of Illinois have granted to all other persons making a similar motion, and insisting upon the protection of the law, similar or identical to that moved by plaintiff in error, but now denied to the plaintiff in error.

IV.

The Supreme court of the State of Illinois erred in denying the motions of plaintiff in error, as shown in foregoing record, to amend and alter the entry made on the record of said Supreme court of its proceeding on the 14th day of September, A. D. 1887, wherein and whereby it is made to appear that plaintiff in error was personally and bodily present when sentence of death was pronounced by said Supreme court, when in truth and in fact plaintiff in error was not personally and bodily present in said Supreme court when said sentence of death was pronounced against plaintiff in error, as appears from the uncontradicted affidavits filed in support of said motions, and as was also well known to the personal knowledge of the judges of said Supreme court presiding at the time said sentence of death was pronounced, and who composed the court on said 14th day of September, A. D. 1887, at the time said motions of plaintiff in error were overruled, as appears from the record hereinbefore set forth; that said action of said Supreme court in refusing and denying the motions to amend the record, as requested by plaintiff in error, was in violation of the Constitution of the United States, and also in violation of the law sand Constitution of the State of Illinois, it being provided by the Statute of Illinois, chapter 37, section 15: "Whenever any judgment shall "have been rendered in the Supreme court, which "upon further consideration, it is found to be erron- "eously entered up, the judges thereof are authorized "during vacation to change the same without order- "ing a rehearing thereof and entering a proper "judgment in said cause, and in case a procedendo shall "have been issued, in such case the judges may recall "the same, and by order of any of the judges all pro- "ceedings taken by reason of such procedendo shall be "vacated and set aside, provided that all such judgments "shall be corrected within six months from the adjourn- "ment of the term at which they may have been entered;" which said statute still remains unrepealed and in full force and effect; and plaintiff in error further says that it appears from the record hereinabove that said motion to amend the record was made within six months from the adjournment of the term at which said judgment was rendered.

V.

The Supreme court of Illinois erred in matter of fact in causing it to be recorded that plaintiff in error was personally and bodily present in said Supreme court of Illinois, at the time said sentence of the 14th day of September, A. D. 1887, was entered of record, as the judges of said Supreme court of Illinois, had personal knowledge of the fact that plaintiff in error was not personally and bodily present in said Supreme court of Illinois, at the time said sentence of death was pronounced by said Supreme court of Illinois, and it is not stated or claimed by the judges of said Supreme court of Illinois in their judgment and opinion overruling the motions of plaintiff in error to amend said record as aforesaid, that in truth and in fact the plaintiff in error was personally and bodily present in said Supreme court of Illinois at the time said sentence of death of the 14th day of September, A. D. 1887, was pronounced, and the said sentence of death pronounced by said court was in derogation of and denial of the rights, privileges and immunities secured to plaintiff in error by the constitution and laws of the United States and of the State of Illinois, and was not due process of law.

VI.

The Supreme court of the State of Illinois erred in pronouncing sentence of death on the 14th day of September, A. D. 1887, therein and thereby directing and ordering to be inflicted upon plaintiff in error the penalty of death, as said court was without jurisdiction of the person of plaintiff in error, and said sentence of death was therefore null and void.

VII.

The Supreme court of the State of Illinois erred in pronouncing said sentence of death recorded as of the 14th day of September A. D. 1887, therein and thereby ordering and directing the infliction of the penalty of death upon the plaintiff in error, he not being then and there bodily present nor notified to be then and there present, nor having waived in any way his lawful right to be so present, and the action of said court was in violation of the constitution and laws of the United States and of the State of Illinois.

VIII.

The Supreme court of Illinois erred in pronouncing said sentence of death, directing and ordering the infliction of the penalty of death upon plaintiff in error in his absence and without notice to him or his attorneys to be present on said day, he having in no way waived his legal right to be present when said Supreme court pronounced said sentence of death, in not issuing process to bring in the plaintiff in error then and there to be present at the time of said sentence, he being then, as well known to said court, confined by due process of law to await his sentence, and said action of the court is in violation of and a denial of and in contravention of the constitution, treaties and laws of the United States and the State of Illinois.

IX.

Plaintiff in error further assigns as error that having the right, privilege and immunity secured to him by the constitution and laws of the United States and of the State of Illinois to have been present at the time said sentence of death was pronounced, so that he might show cause, if any he had, why the sentence of death should not be pronounced against him, and it was further his right and privilege to have the inquiry made of him then and there why the sentence of death should not be passed upon him, and an opportunity should have been given him to state his reason why sentence of death should not then be passed upon him, but this priviiege was not granted him.

X.

The Supreme court of Illinois erred in causing it to be recited and appear on the record of said court that petitioner was personally and bodily present in said Supreme court on the 14th day of September, A. D. 1887, and in pronouncing sentence of death, ordering and directing the infliction of the penalty of death upon plaintiff in error in his absence, and without notice or process to him or his attorney to appear in said court then and there, which proceeding of said court is in violation and denial of the rights, privileges and immunities of plaintiff in error, secured to him under and by virtue of the treaties and constitution of the United States and laws of the State of Illinois.

XI.

That there are other manifest and material errors in said proceeding.

The assignment of errors in Schwab's case is as follows, page 19, transcript of Schwab's record.

I.

The court erred in dismissing appellant's petition for a writ of *habeas corpus*.

II.

The court erred in sustaining the demurrer filed by the Attorney General, as the prayer of the petition did not ask that writ of *habeas corpus* be directed to him.

III.

The court erred in not requiring a return to be filed by A. W. Berggren, warden of the penitentiary at Joliet, in whose custody the petitioner was confined.

IV.

The court erred in sustaining the demurrer to his petition.

V.

The court erred in failing and refusing to discharge the petitioner, appellant herein, from the custody of A. W. Berggren, warden of the penitentiary.

VI.

The petition discloses that the appellant, petitioner herein, is held and detained in custody without warrant or authority of law, in violation of the laws and the constitution of the United States, and the court erred in failing and refusing to grant said writ.

VII.

The petition filed by the appellant in the Circuit court discloses that the petitioner was sentenced to death by the Supreme court of the State of Illinois in the absence of the petitioner, without his fault, which said sentence of death is one of the claims of authority under which said warden imprisons and detains the petitioner, and the fact that petitioner was not present when sentence of death was pronounced upon him by the Supreme court of the State of Illinois is admitted by the demurrer filed herein, and the Circuit court therefore erred in failing to hold that said sentence of death so pronounced by the Supreme court of the State of Illinois was null and void, and constituted no authority to A. W. Berggren, warden of the penitentiary at Joliet, for detaining and imprisoning the petitioner.

VIII.

The Circuit court of the United States erred in failing and refusing to hold that the sentence of death passed by the Supreme court of the State of Illinois in the admitted absence of the petitioner, Michael Schwab, was null and void.

IX.

The Circuit court of the United States erred in holding that the commutation of the governor of the State of Illinois constituted a good and sufficient authority to A. W. Berggren, warden of the penitentiary at Joliet, for the detention and imprisonment of the petitioner.

X.

The court erred in refusing to discharge the petitioner, Michael Schwab, from detention and confinement by A. W. Berggren in the penitentiary at Joliet, such detention being under and by virtue of the commutation of the governor of the State of Illinois, and in violation of the laws and constitution of the United States.

XI.

There are other manifest and material errors in said proceeding as in record.

POINTS.

I.

The Supreme court of the State of Illinois, in refusing to amend the record, so as to clearly and definitely show that Fielden was not present at the time when the sentence of death was pronounced against him, is in violation of and is a denial of his rights to the equal protection of the law.

II.

The allegations contained in the petition, admitted to be true, that the relator, Schwab, was sentenced to death by the Supreme court of the State of Illinois when he was not present, and also the admitted fact as appears from the motion to amend, that Fielden was not present when he was sentenced to death by the Supreme court, establishes that the constitutional rights, guaranteed to them by the Federal constitution, were violated, and thereby they are deprived of their liberty without due requirement of the common law, from its earliest history and always ever since observed, that when a prisoner is to be sentenced to death he must be personally present; to sentence him to death, he not being personally present, is not due process of law.

III.

Is Schwab's detention and confinement, as shown by the allegations of the petition and the exhibits thereto attached and admitted by the demurrer filed thereto by the warden of the penitentiary, as appears from the record, not in violation and contravention of the Constitution of the United States?

IV.

The Supreme court of the state had no power, authority or jurisdiction to pronounce sentence of death against Fielden or Schwab, or order the sheriff of Cook county to carry it into execution.

I.

Refusal to amend the record is a denial of the equal protection of the law.

A.

The court has inherent power.

At first we permit ourselves to consider the points in the case of Fielden, whether any obstacle is presented to the determination of errors, although by anything stated in the opinion of the State court as to its failure to grant the motion to amend the record.

We ask the attention of the court to the Constitution of the United States, Amendment 14, wherein it is provided:

" All persons born or naturalized in the United States
" and subject to the jurisdiction thereof are citizens of the
" United States and of the state wherein they reside. No
" state shall make or enforce any law which shall abridge
" the privileges or immunities of citizens of the United
" States, nor shall any state deprive any person of life,
" liberty or property without due process of law, *nor deny*
" *to any person within its jurisdiction the equal protection*
" *of the laws.*"

Construing the clause " equal protection of the laws," see

Yick-wo v. *Hopkins*, 118 U. S., p. 220,
also Appendix, A.

By the treaty with Prussia and Great Britain these rights and privileges are given to their subjects resident here as to our citizens.

We claim that when Samuel Fielden caused his motion to be made in the Supreme court of the State of Illinois, asking the state Supreme court to amend its record so as to clearly and definitely report the fact, he was not present at the time judgment or sentence of death was pronounced upon him, and the Supreme court denied to grant the motion for any reason whatever, it denied to him the equal protection of the law, thereby violating his treaty rights. It appears from the Fielden record (page 13, whereon is the joint affidavit of Samuel Fielden, Michael Schwab and Oscar Neebe) and also from the Fielden record (page 5, affidavits of W. P. Black and Moses Salomon) that neither Schwab, Fielden or Neebe were present in the Supreme court at the time judgment or sentence of death was given. On the contrary, it affirmatively appears that at that time they were confined in the county jail of Cook county, in the city of Chicago and State of Illinois, while the Supreme court sat in the city of Ottawa, county of La Salle, State of Illinois. And furthermore, it appears from the record that the judges who gave judgment against Fielden, Schwab and Neebe, or most of them, were also present and members of the court at the time the motion to amend the record in the particular indicated, was made. Nor is the truth of the affidavits or the fact that Fielden, Schwab and Neebe were not present in any way impugned, denied or controverted. On the contrary, the facts are admitted by the Attorney General and by the court that they were not present, but were confined in the county jail at the time judgment and sentence of death was given against them. (See opinion of Justice Scholfield, Fielden Rec., page 20.)

It must, therefore, be admitted that the recital of the record is in fact untrue. Such being the case, was not and is not Fielden, the plaintiff in error here, entitled to have such fact made to appear? The court, in which this false entry of the record appears, is the highest tribunal of the state. It is all powerful within the state, and can act as it ought to have done. No state court can review its action. Its conduct is limited only by the constitution. and if it chose to violate the constitution (which will not be presumed), if it do so, and by such act, not in evading any provision of the constitution of the United States, which has application to the states, its conduct cannot be questioned. Without regarding, therefore, the question of time or act, is it not shocking to the sense of justice that the court should refuse to amend the record? Let us consider the reasons of the court for its refusal. In the opinion by Scholfield, Judge, it is said (Fielden Rec., 20): "The "purpose of the proposed amendment of the record, as "we learn from the argument of counsel, is to make it "appear by the record that these plaintiffs in error have "been deprived of an important constitutional right— "that of being present when this court rendered judg-"ment affirming the judgment of the Criminal court of "Cook county—they contending that without their pres-"ence such judgment could not be pronounced.

"The effect which it is claimed will result from the "proposed amendment is, therefore, in derogation of "the judgment, as they contend, to nullify and destroy "it. It must hence be manifest that this motion ought to "have been made at the term at which that judgment "was rendered; for, not having been made then, it can "avail nothing as to Spies, Parsons, Lingg, Engel and "Fischer, and, but for executive clemency, under which, "and not any judgment of court, Fielden and Schwab are "now in the penitentiary, they could not cause the mo- "tion to be made. Under our practice amendments of the "record in affirmance of the judgment, when there is "anything to amend by, may, upon notice, be made at a "term subsequent to that at which final judgment is ren- "dered; but amendments not in affirmance but in deroga- "tion of the judgment are not allowed at a term subse- "quent to that at which final judgment is rendered. (*Fl.* "*Mill Co.* v. *Mer. N. Bank*, 97 Ill., 294. See also Powell " on Appellate Proceedings, Appendix, p. 387, note 1.) "The amendment in *Phillips* v. *The People*, 88 Ill., 161, " was made before final judgment, and that in *May* v. *The* " *People*, 92 Ill., 346, was also before final judgment, and it " was, moreover, in affirmance of the judgment. The " other cases cited by counsel are less pertinent, and there- "fore demand no comment. This motion, not having been " made at the same term at which final judgment was ren- " dered nor until the case had passed beyond the power of " this court to stay by its order, the execution of the judg- " ment clearly becomes too late. But it must not be un- " derstood that we concede that the amendment, if made, "could have affected the validity of the judgment. In " our opinion the amendment, if made, would be incon- " sequential and would not affect in the slightest degree " the rights of the parties under the judgment."

We insist that the State court should have granted the motion, and its failure and refusal to do so was a violation of the federal constitution. In presenting our views of Fielden's rights in the premises we shall answer the objections made by the court:

It is provided by the constitution of the State of Illinois (Ordinance of the United States of 1787 creating the State of Illinois, Article II):

"No man shall be deprived of life, liberty or prop-
"erty, but by the judgment of his peers or the law of
"the land." Constitution of Illinois, article 2, section 2:

"No person shall be deprived of life, limb or property
"without due process of law." Constitution of Illinois, article 2, section 19:

"Every person ought to find a certain remedy in the
"laws for all injuries and wrongs which he may receive
"in his person, property or reputation; he ought to obtain
"by law right and justice freely, without being obliged
"to purchase it, completely and without denial, promptly
"and without delay."

Bearing in mind section 19 of article 2 that "every "person ought to find a certain remedy in the laws for "* * * for all wrongs which he may receive in his "person. * * * He ought to obtain by law right "and justice freely * * * and completely and with- "out denial, promptly." We submit that a refusal to amend the record by the State Supreme court at any time so long as it appears to the court in accordance with the truth and the fact, is to deny him a remedy in the law, to perpetrate a wrong upon his person, and to deny him right and justice. And we submit, if no other reason exist for this amendment than that above, it, the motion of Fielden ought to have been granted; not to do so was a violation of the federal constitution.

B.

Also the statute *provides that such amendments may be made.*

The statutes of the State of Illinois, provide, Chapter 37, title Supreme court, section 15: "Whenever any judgment shall have been rendered in the "Supreme court which, upon further consideration is "found to have been erroneously entered up, the judges "thereof are authorized during the vacation, to change "the same without ordering a rehearing thereof, by entering a proper judgment in said cause, and in case a "procedendo shall have been issued in such cause; the "judges may recall the same, and by order of any of the "judges all proceedings taken by reason of such procedendo shall be vacated and set aside: Provided that "all such judgments shall be corrected within six months "from the adjournment of the term at which they have "been rendered."

Keeping in mind this statute, we will consider the statement of the Supreme court that "the motion not having "been made at the *same term* at which final judgment "was rendered, nor until the case had passed beyond the "power of this court to stay by its order for the execution of the judgment, clearly comes too late."

An examination of the Fielden record (page 10) will disclose that the judgment was entered on the 14th of September, 1887; that the court adjourned on the 26th of September, 1887, and did not again meet until the March term, 1888, being the 6th day of March, 1888. (Fielden Rec., 30.)

It appears further (Fielden Rec., 3) that on the 5th of March, 1888, the motion to amend the record was entered. It thus becomes manifest that Fielden, the plaintiff in error, complied with the requirements of the statute by filing his motion and submitting it to the court within six months from the adjournment of the term at which they rendered their judgment. This reason, if no other, under or by reason of the judgment of the court, would have entitled the plaintiff in error to have the record amended, and the failure of the State court to observe the plain statutory requirements in favor of Fielden upon his application was to deny him the equal protection of the laws.

Former decisions.

C.

Like motions granted to all others.

We respectfully submit to this court that it has been the practice in cases arising in the State courts previous, both in civil and criminal cases, to amend the record, and it has been granted to all applicants but the plaintiff in error in this case. That such is the fact will appear from an examination of the following authorities:

Wallahan v. *The People*, 40 Ill., 102; *Goodrich* v. *The City of Minonk*, 62 Ill., 122; *Phillips* v. *The People*, 88 Ill., 161; *May* v. *The People*, 92 Ill., 346; 1 Bishop on Crim. Procedure, Sec. 1160; *Devine* v. *The People*, 100 Ill., 295; *Dougherty* v. *The People*, 118 Ill., 160; *Shipley* v. *Spencer*, 40 Ill., 107; *Lyon et al.* v. *Boilvin*, 7 Ill., 634; *Coughran* v. *Gutchens*, 18 Ill., 392; *Duncan* v. *McAffee*, 3 Scam., 93; *Atkins* v. *Hinman*, 2 Gilm., 437; *O'Connor* v. *Mullen*, 11 Ill., 57; *Stahl* v. *Webster*, 11 Ill., 511; *Newman* v. *Ravenscroft*, 67 Ill., 496; *Church* v. *English*, 81 Ill., 442; *Gillett* v. *Booth*, 6 Bradw., 423;

Gillett v. *Booth*, 95 Ill., 183; *Tucker* v. *Hamilton*, 108 Ill., 464; *Gaff* v. *Spelmeyer*, 13 Bradw., 294; *Planing Mill Co.* v. *National Bank*, 86 Ill., 590; *Dunham* v. *South Park Commissioners*, 87 Ill., 186; *Ives* v. *Huke*, 17 Bradw., 30.

The quotations from above authorities, bearing on the point at bar, for the convenience of the court is printed in Appendix B— .

II.

The allegations contained in the petition, admitted to be true, that the relator Schwab was sentenced to death by the Supreme court of the State of Illinois when he was not present, further it indisputably appearing from the record that neither in the Supreme court nor in the Criminal court of Cook county was either Fielden or Schwab asked what, if anything, they had to say why sentence, etc., establishes that the constitutional rights guaranteed to them by the Federal Constitution, were violated, and thereby they are deprived of liberty, it being a requirement of the common law from its earliest history, and always ever since observed, that before a prisoner can be sentenced to death, he must be personally present and enquired of if he had anything to say, and to sentence him to death without his being personally present and inquiring, is not due process of law.

In presenting the questions we assume for the present that there is no technical objection to a proper consideration of our claim as presented in the petition for *habeas corpus* of Schwab, or in Fielden's case, so that but one argument is needed for both.

A. It is an absolute requirement that at the time sentence of death is imposed that the person upon whom sentence of death is to be imposed, shall be personally present at such time, and a failure to have the defendant present and sentencing him to death in his absence is a violation of the constitution of the United States providing for due process of law.

B. That where the sentence of death has not been carried out or executed, and the time fixed therefor has elapsed, can a court in the absence of the person, and without enquiring of him what he hath to say, etc., order or sentence him to be put to death? We insist that, by the law of the State of Illinois, and the common law and the Constitution of the United States, the act of the state court in sentencing the parties before this court to death, in their absence and without asking, etc., is in violation of the constitution, and the sentence is void.

C. That the record must affirmatively show the presence of a person sentenced for a capital offense, and it must also show that he was asked what he hath to say, etc. This not appearing, is fatal error and makes the judgment void.

As fully sustaining these propositions, see

Ball v. *U. S.*, 140 U. S., 118.

It seems to be conceded by the Supreme court of the State of Illinois that it is required that a defendant in a capital case shall be present in the *nisi prius* court when sentence of death is imposed.

In *Fielden* v. *People*, 128 Ill., p. 595, opinion by SCHOLFIELD:

"The common law required when any corporal punishment was to be inflicted upon the defendant, that he should be personally present before the court at the time of pronouncing the sentence." Citing 1 Chitty Crim. Law, 5 Am. Ed., 693-696.

In *Ball* v. *United States*, 140 U. S., 118, in opinion recently deliveredby his Honor Chief Justice Fuller, says:

"At common law no judgment for corporal punish-"ment could be pronounced against a man in his absence, "and in all capital felonies it was essential that it *should* "*appear of record* that the defendant was asked before "sentence if he had anything to say why it should not be "pronounced." Citing *Rex* v. *Harris*, 1 Ld. Raymond.

2 Hale P. C. 401; Com. Dig. Indictment N., 2.; Hawk. ch. 48, sec. 22; Wharton Cr. Pr., 549–906; *Messner* v. *People*, 45 N. Y., 1; *Dougherty* v. *Commonwealth*, 69 Pa. St., 286; *Croaker* v. *State*, 47 Ala., 53; *James* v. *State*, 45 Miss., 592; *State* v. *Jennings*, 24 Kas., 642; 1 Bish. Cr. Proceed. secs. 275–1,293; 1 Chitty Cr. Law, 699; Cooley's Const. Lim., 4 Ed., p. 393; Wharton Pr. & Pl., sec. 912; Wharton Pr. & Pl., sec. 950r *State* v. *Hurlbut*, 1 Root, 90; *Stubbs* v. *State*, 49 Miss., 716; *Rose* v. *State*, 62 Wis., 391; Wharton Cr. Law, 7 Ed., Vol 3, sec. 2,798; 1 Chitty Cr. Law, p. 695; 1 Ld. Ray., p. 482; 1 Ld. Ray., 267; *Cole* v. *State*, 5 Eng., 324; *Son* v. *People*, 12 Wend., 348; *People* v. *Wenchel*, 7 Cow., 524; *Dunn* v. *Com.*, 6 Barr., 388; Blackstone Comm., b. 4, ch. 24, p. 318; *Gibson* v. *State*, 39 Ala., 693: *Graham* v. *State*, 40 Ala., 660; *Brooks* v. *People*, 88 Ill., 330; *People* v. *Hinchel*, 7 Cow., 525.

The requirements of the common law that a person accused of a felony, who is to be sentenced to death, must be personally present, though often adjudicated, still requires a further determination from the courts, a notable example of which is a recent case in the Supreme court of the State of Illinois, in which the court said:

Harris v. *The People*, 130 Ill., 459, opinion by Mr. Justice Bailey:

"It has been a well established rule of the common "law from an early period, that a prisoner accused of a "felony must be arraigned in person and must plead in "person, and his personal appearance is required through-

“ out the trial, and at the time sentence is pronounced.
“ As said by Mr. Chitty: ‘ Although a defendant ac-
“ cused of a misdemeanor may be found guilty in his ab-
“ sence, this can never be done in capital felonies, but it is
“ necessary that he should personally attend, *and it should*
“ *so appear on the record.*’ 1 Chit. Crim. Law, 414. A
“ leading authority on this question is *Rex* v. *Harris*, 1
“ Ld. Raym., 267; Comb., 447; Holt, 399; Skin., 684, in
“ which it was held by Lord Holt, that a judgment can-
“ not be given against any man in his absence for a
“ corporal punishment.

“ The same rule has been generally adopted in this
“ country. Mr. Bishop in discussing the question in its re-
“ lation to the imposition of sentence, says: ‘ Where the
“ offense is a misdemeanor of a kind punishable by fine
“ or though by fine and imprisonment, where a fine only
“ is imposed, the doctrine seems pretty plainly to be, that
“ it is within the discretion of the court to render judg-
“ ment in the defendant's absence. But if there is to
“ be imprisonment, or any other punishment higher than
“ a fine, whether in treason, felony or misdemeanor, the
“ defendant must be personally present.”

1 Bishop's Crim. Proceed., Sec. 275.

“ This doctrine is supported by the following decisions:

“ *People* v. *Winchell*, 7 Cow., 525; *Rolls* v. *The State*,
“ 52 Miss., 391; *Hooker* v. *Commonwealth*, 13 Gratt., 763;
“ *Sperry* v. *Commonwealth*, 9 Leigh., 625; *Hamilton* v.
“ *Commonwealth*, 16 Pa. St., 129; *Prine* v. *Commonwealth*,
“ 18 *id.*, 103; *Peters* v. *The State*, 39 Ala., 681; *Gibson* v.
“ *The State*, *id.*, 693; *Graham* v. *The State*, 40 *id.*, 659;
“ *Andrews* v. *The State*, 2 Sneed, 459; *Smith* v. *The*
“ *People*, 8 Col., 457; *State* v. *Davenport*, 33 La. Ann.,
“ 231.”

The foregoing citation of authorities is sufficient to justify the claim which we make, that it is an absolute requirement of the common law that the defendant be present when sentence of death be imposed upon him, and that he be asked if he hath anything to say why sentence should not be pronounced. In this respect the Constitution of the United States is but declaratory of the common law when it requires "that no person shall be de-"prived of life, liberty or property without due process "of law," for it certainly is not due process of law if a sentence of death be imposed in the absence of a party upon whom such sentence be declared.

But the state Supreme court refuse to recognize the law as binding on them in the case at bar.

The opinion of state Supreme court in Fielden case is, Record, page 21, by Scholfield, JUSTICE, on proposition "B," is: "It is manifest that none of these can apply to this "court, because first, it acts and decides only upon the "record made in the court below. It can, therefore, have "nothing to do with the question of the identity of the "party, whom the sheriff shall have in his custody for "punishment, nor can it entertain a motion in arrest nor "a plea of pardon, and since its opinion is prepared and "written out and filed with the clerk without being read "from the bench, there is, when judgment and affirmance "is given, no animadversion and open denunciation of "punishment which could benefit by-standers. If the "present plaintiffs in error, and their counsel had been "actually present in court when the judgment of affirm-"ance here was entered, *the law allowed them to say or* "*do nothing* which by any possibility could have benefited "plaintiffs in error. They were, after judgment was "entered entitled only to move for a rehearing, and this "could only be done on printed petition. * * * No "claim is made that plaintiffs in error had not time to file "a petition for rehearing. They did not seek to avail of "that right but voluntarily waive it.

"In *People* v. *Clark*, 1 Parker's Cr. Rt., 360, the "Supreme court of New York at a general term held "that on a writ of error brought to reverse a judgment in "a capital case, the personal attendance of the defendant "on the argument or at the decision in the Appellate "court, is not necessary to give such court jurisdiction, "and there was a like rule in *Donnely* v. *State*, 2 Dutcher, "463.

"We may add moreover it has not been the practice of "this court from its organization to the present time to have "the plaintiff in error in a criminal case actually present "in court at the hearing and when final judgment was "given and it is clear from the different provisions of "the statute that it not only does not provide for their "presence but contemplates that they will not be present.

"Thus under Div. 15 of our Criminal Code, Rev. St., "1874, page 415, it is provided, Sec. 6:

"'When the court or judge is of opinion that the party "obtaining such writ ought to be bailed until the determination of the writ, and he is at the time in custody, "the court or judge may make an order to admit such "prisoner to bail upon his entering into a recognizance "* * * conditioned that the prisoner will appear, "(not in this court as would be required, were his presence here indispensable, but) at the next term of court "in which his trial took place and each subsequent "term of said court on the first days thereof until the "determination of such writ of error.' * * * In section 7 it is provided:

"'If the prisoner is in custody of the sheriff he shall "take the recognizance; if in custody of the warden of "the penitentiary he shall take the recognizance.

"In either case the recognizance shall be returned to

" the next term of court in which the prisoner was sen-
" tenced.' * * * It is provided in section 11: 'In
" case of the reversal of any judgment upon which any
" person has been committed to the penitentiary and the
" granting of a new trial by the Supreme court, it shall
" be the duty of the warden of the penitentiary upon re-
" ceiving a certified copy of said judgment of the Su-
" preme court to deliver the person so committed to the
" sheriff of the county where such new trial is to be had.'
" If such person were in court at the time the judgment is
" pronounced, and in custody, he would necessarily be in
" the custody of the sheriff of the county where this
" court is then being held, and the statute instead of pro-
" viding as thus quoted, would then have provided that
" the prisoner be delivered by the sheriff having him in
" custody to the sheriff of the county where such new
" trial is to be had. We are not unmindful that it is
" guaranteed by section 9, article 2 of the constitution of
" this state that 'in all criminal prosecutions the accused
" shall have the right to appear and defend in person and
" by counsel, but it is clear that this has reference to trials
" at *nisi prius* only. The entire paragraph reads thus:

" 'In all criminal prosecutions the accused shall have
" the right to appear and defend in person and by coun-
" sel, to demand the nature and cause of the accusation,
" and to have a copy thereof, to meet the witnesses face
" to face, and to have process to compel the attendance
" of witnesses in his behalf, and a speedy public trial by
" an impartial jury of the county.' All of these plaintiffs
" in error have fully enjoyed in the trial in the Criminal
" court resulting in their conviction, but they are not now
" defending against a prosecution. They are themselves
" prosecuting a suit to reverse the judgment by which

"they were convicted, and it is therefore impossible that "these provisions can have any application to it.

"*Took* v. *State* (Tex., 3, S. W. R., 782).

"The mere naming of the day on which the sentence "was to be executed, was but the exercise of a min-"isterial power, which at common law was sometimes "exercised by the sheriff.

"1st Crim. Law., 5 Am. Ed., 782.

"And is in this case exercised by the governor in case "of a temporary reprieve."

We respectfully submit that the reasoning of the Supreme court is not applicable to the case at bar. First. It is proper to inquire if this court will adopt or be bound by the determination in that respect of the State Supreme court, or will examine and determine for itself whether it is a requirement of the common law and such as is contemplated as being necessary and required by the fourteenth amendment of the constitution of the United States that the person shall be present and asked, etc.

We submit that this court is not bound by the State court decisions.

In *Smith* v. *Ala.*, 124 U. S., 465,

which was a writ of error to the Supreme court of the State of Alabama to review judgment of that court, affirming the judgment of the city court of Mobile in proceedings for a writ of *habeas corpus*, brought to discharge plaintiff from a commitment. This court speaking by Mr. Justice MATTHEWS, said:

"There is no common law of the United States, in "sense of a national customary law, distinct from the

“ common law of England as adopted by the several
“ states, each for itself, applied as its local law, and sub-
“ ject to such alteration as may be provided by its own
“ statutes. *Wheaton* v. *Peters*, 33 U. S., 8 Pet., 591 (8:)
“ 1,055. A determination in a given case of what the
“ law is may be different in a court of the United States
“ from that which prevails in the judicial tribunals of a
“ particular state. This arises from the circumstances
“ that the courts of the United States, in cases within
“ their jurisdiction, where they are called upon to admin-
“ ister the law of the state in which they sit, or by which
“ the transaction is governed, exercise an independent
“ though concurrent jurisdiction, and are required to
“ ascertain and declare the law according to their own
“ judgment. This is illustrated by the case of *N. Y.*
“ *Cent. R. R. Co.* v. *Lockwood*, 84 U. S., 17 Wall., 357
“ (21:) 627, where the common law prevailing in the
“ State of New York, in reference to the liability of
“ common carriers for negligence, received *a different*
“ *interpretation from that placed upon it by the judicial*
“ *tribunals of the state;* but *the law applied was none the*
“ *less the law of that state.*

“ In cases, also, arising under the *lex mercatoria*, or
“ law merchant, by reason of its international character,
“ this court has held itself less bound by the decisions of
“ the state courts than in other cases. *Swift* v. *Tyson*,
“ 41 U. S., 16; Pet. 1 (108, 65); *Carpenter* v. *Provi-*
“ *dence Washington Ins. Co.*, 41 U. S., 16 Pet., 495
“ (10, 1,044); *Oates* v. *First National Bank*, 100 U. S.,
“ 239; (25, 580); *Brooklyn C. & N. R. R. Co.* v. *Na-*
“ *tional Bank of the Republic*, 102 U. S., 14; (26, 61).

“ There is, however, one clear exception to the state-
“ ment that there is no national common law. The inter-

"pretation of the Constitution of the United States is nec-"essarily influenced by the fact that its provisions are "framed in the language of the English common law, and "are to be read in the light of its history. *The code of con-"stitutional and statutory construction, which, therefore, is "gradually formed by the judgments of this court in the ap-"plication of the Constitution and the laws and treaties "made in pursuance thereof, has for its basis so much of "the common law as may be implied in the subject, and con-"stitutes a common law resting on national authority.* *Moore* v. *U. S.*, 91 U. S., 270 (23, 346)."

We will, therefore, proceed to ascertain what is the common law provision in reference to requiring the presence of the defendant under circumstances as they existed in this case, where judgment had once been pronounced, the time fixed for its execution, and order for execution had issued, but the time had expired without execution having been done.

It is provided by the Constitution of the United States, "Amendment 14th, first: "All persons born naturalized "in the United States, and subject to the jurisdiction "thereof, are citizens of the United States and of the state "wherein they reside. No state shall make or enforce "any law which shall abridge the privileges or immuni-"ties of the citizens of the United States; nor shall any "state deprive any person of life, liberty or property "without due process of law, nor deny to any person within "its jurisdiction the equal protection of the laws."

The action of the court of a state is the act of the state. See

Neal v. *Delaware*, 13 Otto, 370; *Virginia* v. *Rives*, 100 U. S., 313; *Strander* v. *West Va.*, 10 Otto, 313; *C., M. & St. Paul* v. *Minn.* 134 U. S., 467; *Clark* v. *Southern Pacific*, Fed. Rep., 396.

This court, considering whether presence was necessary as constituting due process of law, said in *Hopt* v. *Utah*, 110 U. S., 574, speaking by Mr. Justice HARLAN:

"It is insisted, on behalf of the defendant, that the "action of the court in permitting the trial in his absence, "of challenges of jurors, was so irregular as to vitiate all "the subsequent proceedings. This point is well taken.

"The criminal code of Utah does not authorize the "trial by triers of grounds of challenge to be had apart "from the court, and in the absence of the defendant. "The specific provisions made for the examination of "witnesses 'on either side' subject to the rules of evi"dence applicable to the trial of other issues, shows that "the prosecuting attorney and the defendant were entitled "of right to be present during the examination by the "triers. It certainly was not contemplated that witnesses "should be sent or brought before the triers without the "party producing them having the privilege, under the "supervision of the court, of propounding such questions "as would elicit the necessary facts, or without an oppor"tunity to the opposite side for cross-examination. "These views find some support in the further provision "making it the duty of the court 'when the evidence is "concluded" and before the triers make a finding, to "instruct them as to their duties. In the case before us "the instructions to the triers were given before the latter "proceeded with the trial of the challenges.

"But all doubt upon the subject is removed by the "express requirement, not that the defendant may, but, "where the indictment is for a felony, must be 'person"ally present at the trial.' The argument, in behalf of "the government, is that the trial of the indictment "began after and not before the jury was sworn;

" consequently that, the defendant's personal presence was not required at an earlier stage of the " proceedings. Some warrant, it is supposed by " counsel, is found for this position, in decisions construing particular statutes in which the word 'trials' is " used. Without stopping to distinguish those cases " from the one before us or to examine the grounds on " which they are placed, it is sufficient to say that the purpose of the foregoing provisions of the Utah Crimina " Code is, in prosecutions for felonies, to prevent any " steps being taken, in the absence of the accused and " after the case is called for trial, which involves his substantial rights. The requirement is, not that he must " be personally present at the trial by the jury, but 'at " the trial.' The code, we have seen, prescribes grounds " for challenge by either party of jurors proposed. And " provision is expressly made for the 'trial' of such challenges; some by the court, others by triers. The prisoner is entitled to an impartial jury composed of persons " not disqualified by statute, and his life or liberty may " depend upon the aid, which, by his personal presence, " he may give to counsel and to the court and triers, in " the selection of jurors. The necessities of the defense " may not be met by the presence of his counsel only. " For every purpose, therefore, involved in the requirement that the defendant shall be personally present at " the trial, where the indictment is for a felony, the trial " commences at least from the time when the work of impaneling the jury begins.

" But it is said that the right of the accused to be present before the triers was waived by his failure to object " to their retirement from the court room, or to their trial " of the several challenges in his absence.

“We are of the opinion that it was not within the power of the accused or his counsel to dispense with the statutory requirement as to his personal presence at the trial. The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view, as well of the relations which the accused holds to the public as of the end of human punishment. The natural life, says Blackstone, ‘cannot legally be disposed of or destroyed by any individual, neither by the person himself nor by any other of his fellow creatures, merely upon their own authority.’ (1 Bl. Com., 133.) The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused; much less by his mere failure, when on trial and in custody, to object to unauthorized methods. The great end of punishment is not the expiation or atonement of the offense committed, but the prevention of future offenses of the same kind. (4 Bl. Com., 11.) Such being the relation which the citizen holds to the public, and the object of punishment for public wrongs, the legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony, that he shall be personally present at the trial, *that is, at every stage of the trial, when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the constitution.*

"For these reasons we are of opinion that it *was error*, "which *vitiated* the verdict and judgment, to permit the "trial of the challenges to take place in the absence of "the accused."

We therefore proceed to examine the law of the state as to requirements of the presence of the prisoner at the time of sentence, when it is for a felony.

By the state constitution it is provided, article 2, section 2, "No person shall be deprived of life, liberty or "property without due process of law."

It is further provided, chapter 28, Revised Statutes of Illinois, section 1, "That the common law of England, so "far as the same is applicable and of a general nature, "and all statutes or acts of the British Parliament made "in aid of, and to supply the defects of the common law, "prior to the fourth year of James the First, excepting "the second section of the sixth chapter of 43d Elizabeth, "the eighth chapter of 13th Elizabeth, and ninth chapter "of 37th Henry Eighth, and which are of a general nature and not local to that kingdom, shall be the rule of "decision, and shall be considered as of full force until "repealed by legislative authority."

Other provisions of the statute in reference to the subject we are now discussing are contained in chapter 38, known as the criminal code of the state, and which are as follows:

By an act entitled "Criminal Code," Ch. 38, Sec. 428, p. 443, Hurd's Revised Ed., 1885, it is provided, section 428:

"All trials for criminal offenses shall be conducted ac- "cording to the course of the common law, except when "this act points out a different mode, and the rules of

" evidence of the common law shall also be binding upon
" all courts and juries in criminal cases, except as other-
" wise provided by law."

By an act entitled " Courts," Ch. 37, Hurd's Revised Statute of Illinois, it is provided, section 7:

" The Supreme court shall be vested with all power
" and authority necessary to carry into complete execu-
" tion all its judgments, decrees and determinations in
" all matters within its jurisdiction, according to the rules
" and principles of the common law and of the laws of
" this state."

Section 9:

" Its process shall run in the name of the people of the
" State of Illinois, bear test in the name of the chief jus-
" tice, be signed by the clerk of the court for the grand
" division from which it is issued, dated when issued,
" sealed with the seal of the court, and made returnable
" according to the law or such rules or orders as may be
" prescribed by the court."

Section 10:

" Any process which may be issued from the Supreme
" court, or any justice thereof or the clerk, according to
" law, shall be executed by the officer or person to whom
" it is directed in any county or place in this state, in the
" usual manner that process is or may be required to be
" executed and returned."

By an act entitled " Courts," Ch. 37, Secs. 86 and 87, p. 360, Hurd's Revised Statute of Ill., it is provided, Sec. 86:

" Process from said court may be in like form, and
" shall be issued in the same manner as from Circuit
" courts."

Sec. 87, it is provided:

"The practice in said court shall be the same, as far "as may be, as in the Circuit court."

By an act entitled "Criminal Code," Ch. 38, Hurd's Ed. 1885, it is provided, section 444:

"In all cases where the punishment shall be confinement in the penitentiary, if the case is tried by a jury, "the jury shall say in their verdict for what time the offender shall be confined, and the court in pronouncing "sentence, shall designate what portion of time the offender shall be confined to solitary imprisonment, and "what portion to hard labor."

Section 451, it is provided:

"When any person is convicted of an offence under "any statute, or at common law, the court shall give "judgment that the offender pay the costs of the prosecution."

Section 452, it is provided:

"When a fine is inflicted, the court may order, as a "part of the judgment, that the offender be committed "to jail there to remain until the fine and costs are fully "paid or he is discharged according to law."

Section 453, it is provided:

"The property real and personal, of every person who "shall be convicted of any offense, shall be bound and a "lien is hereby created on the property, both real and "personal, of every such offender, not exempt from execution or attachment, from the time of finding the indictment at least so far as will be sufficient to pay the "fine and costs of prosecution. The clerk of the court "in which the conviction is had shall, at the end of the "term, issue an execution for every fine that shall have "been imposed during the term, and remains unpaid, and "all costs of conviction remaining unpaid; in which exe-"cution shall be stated the day on which the arrest was "made, or indictment found, as the case may be. The "execution may be directed to the proper officer of any "county in this state. The officer to whom such execu-"tion is delivered shall levy the same upon the estate, "real and personal, of the defendant, (not exempt from "execution) possessed by him on the day of the arrest "or finding the indictment, as stated in the execution, and "any such property subsequently acquired; and the prop-"erty so levied upon shall be advertised and sold in the "same manner as in civil cases, with the like rights to all "parties that may be interested therein. It shall be no "objection to the selling of any property under such exe-"cution, that the body of the defendant is in custody for "the fine or costs, or both."

Sec. 454, it is provided:

"If the person convicted, together with one or "more sufficient sureties, will acknowledge a judgment "in favor of the people of the State of Illinois for the "amount of the fine and costs, or the costs only, "when no fine is imposed, the court shall cause the "same to be entered in full satisfaction of the fine "and costs, or costs only, with a direction that if the "judgment is not paid within five months from the "time of entering the same, execution shall be issued "thereon; and the defendant shall, upon the entering "of such judgment, be discharged from imprison-"ment on account of such fine or costs, but he "shall not be thereby discharged from any imprisonment "which is made a part of his punishment, not dependent up-

" on the payment of the fine or costs. Such judgment shall " be a lien upon all the real estate of the persons acknow- " ledging the same, from the date of its entry. If the " judgment so entered is not paid within five months " from the entry, it may be enforced by execution, in the " same manner as other judgments at law. Such judg- " ment may be acknowledged in vacation before the " clerk of the court, and he may, in such case, approve " the surety; and a judgment so acknowledged shall " have the same force and effect from the date of the " entry as if entered in term time in open court."

By an act entitled " Criminal Code," Ch, 38, Hurd's Ed. Revised Statute of Illinois, page 447, it is provided, section 458:

" In any prosecution by indictment for a capital offense, " when the sentence is death, the party aggrieved by man- " ifest and material error, appearing of record, may be " relieved by writ of error in the following manner, to " wit:

" 1. He shall obtain a certified copy of the record " from the clerk, and a certificate from the judge who " tried the cause, or from the prosecuting officer on the " trial, that he is of opinion that such record contains a " full and true history of the proceedings on the trial.

" 2. He shall present such transcript and certificate, " with an assignment of the errors relied upon, to the Su- " preme court if in session, or to one of the judges there- " of in vacation.

" 3. If, after inspecting such transcript, the court or " judge is of opinion that there is a reasonable cause for " allowing a writ of error, and shall also be of the opinion " that there is a reasonable doubt as to the guilt of the de- " fendant, it shall be granted by endorsement on the back "of such transcript, with the direction that the same should "be a *supersedeas*.

"4. Upon the filing of such transcript and order the "clerk of the Supreme court shall issue a *supersedeas* to "stay the execution of the sentence of death until the "further order of the court, but the prisoner shall not be "discharged from jail."

By an act entitled "Criminal Code," Ch. 38 Revised Statute, Sec. 456, Hurd's Revised Statute of 1885, p. 447, Sec. 456, it is provided:

"When a convict shall be sentenced to imprisonment "in the penitentiary, the clerk of the court *shall forth-* "*with deliver a certified copy of the judgment to the sheriff* "*or other proper officer of the county who* shall without "delay convey the convict to the penitentiary of the state "and deliver him to the warden thereof."

By an act entitled "Criminal Code," chapter 38, sections 414 and 415, Revised Statue of 1885, page 441, Hurd's Edition, section 414, it is provided:

"When an indictment is found as a true bill, if the of-"fense is bailable the court shall make an order fixing "the amount of the bail to be required of the accused. "When the court orders process against the accused re-"turnable forthwith, the amount of bail need not be fixed "until the accused is brought into court."

SEC. 415: "The clerk of the court in which the indict-"ment is found shall immediately issue process *capias* for "the apprehension of each person indicted, directed to the "sheriff, coroner, or any constable of the county where "such person then is or is supposed to be. When deemed "necessary, warrants may issue to different counties at the "same time."

By an act entitled "Criminal Code," chapter 38, section 459, Hurd's Edition, Revised Statute of Illinois, page 447, it is provided, section 459:

"If the judgment is affirmed, the Supreme court, "shall, by *order*, fix the time when the original sentence "of death shall be executed, a copy of which order shall "be sufficient authority to the sheriff, for the execution "of the prisoner at the time therein specified."

By an act entitled "Criminal Code," chapter 38, division 14, section 439, page 444, Hurd's Revised Statutes, edition 1885, it is provided, section 439:

"The manner of inflicting the punishment of death "shall be by hanging the person convicted, by the neck, "until dead, at such time *as the court shall direct*, not less "than fifteen nor more than twenty-five days from the "time sentence is pronounced."

By an act entitled "Criminal Code," chapter 38, section 442, page 445, Hurd's edition of the statutes of 1885, it is provided, section 442:

"The sheriff, or the deputy, or the judges attending "such execution shall prepare and sign officially a certifi-"cate setting forth the time and place thereof, and that "such criminal was then and there executed in conform-"ity to the sentence of the court, and the provisions of "this act shall procure to said certificate the signatures of "the other officers and persons not relatives of the crim-"inal, who witnessed such execution, which certificate "shall be filed with the clerk of the court where the con-"viction of such criminal was had."

In none of these provisions is anything expressly stated in reference to a party in a criminal case being present at any stage of the case, yet it cannot for a moment be doubted that by the requirements of the common law, as stated by this court, his absence in any instance, would be a trial or condemnation without due process of law and in violation of the constitutional right and the act of the court or state, the court acting for the state, would be void; not merely erroneous, but absolutely void.

We call the attention of this court to the sections of the statute quoted by the Supreme court of the state in the opinion of Mr. Justice SCHOLFIELD. The court there refer to division 15 of the Criminal Code, Revised Statutes, 1874, section 6, that "When the court or judge is of opinion that the "party obtaining such writ ought to be bailed until the "determination of the writ, and he is at the time in custody, the said court or judge may make an order to admit the prisoner to bail upon his entering into a recognizance, conditioned that the prisoner will appear at the "next term of the court in which his trial took place and "at each subsequent term of said court on the first days "thereof, until the determination of such writ of error." The state Supreme court, in parenthesis, remark, "Not "in this court as would be required were his presence "here indispensable." And again, the court quote section 7, "If the prisoner is in custody of the sheriff, he "shall take recognizance; in either case the recognizance "shall be returned to the next term of the court in which "the prisoner was sentenced." * * * And again, quote section 11, "In case of the reversal of any judgment upon which any person has been committed to the "penitentiary and the granting of a new trial by the Supreme court, it shall be the duty of the warden of the "penitentiary upon receiving a certified copy of such "judgment of the Supreme court, to deliver the person "so committed to the sheriff of the county where such "new trial is to be had," etc.

We respectfully submit that these quotations of the statute by the State Supreme court as contained in its opinion have absolutely no relevancy whatsoever to the questions we are discussing. By those sections the acts therein required in no manner contemplated depriving défendant of his life or liberty, and the provisions cited by the court are merely regulations for admitting a prisoner to bail, not depriving him of life or liberty, but designating the manner in which he may obtain his liberty, save his life. The acts provided for in the sections quoted by the court are in favor of the liberty and life of a prisoner. The acts of the court, however, of which we complain, are those which deprive him of his life and liberty.

Again, the State Supreme court quote section 9 of article 2 of the constitution of the state, wherein it is provided that "in all criminal prosecutions the accused "shall have the right to appear and defend in person and "by counsel, but it is clear from the connection of the "clause, that this has reference to trials at *nisi prius* "only."

The entire paragraph reads thus: "In all criminal "prosecutions the accused shall have the right to appear "and defend in person and by counsel, to demand the "nature and the cause of the accusation and to have a "copy thereof, to meet the witnesses face to face and to "have process to compel the attendance of witnesses in "his behalf, and a speedy public trial by an impartial jury "of the county."

In this respect again, the Supreme court of this state, quote a provision of the constitution which we respectfully submit is not at all applicable, nor has it ever been claimed to be so to the point now under discussion. The provision of the state constitution which provides for due process of law is the provision upon which the parties herein rely as being applicable to their contention that a sentence to death in their absence and without calling upon them, as to what they have to say why such sentence should not be executed, is the provision under which they claim protection in this court; and whether the provision cited by the State Supreme court has reference to *nisi prius* courts only, does not in the least affect our contention.

Again, the State Supreme court has fallen into error in citing the case of *People* v. *Clark*, as being against our contention.

The State Supreme court says:

" In the case last cited, the Supreme court of New " York, at a general term, held that on a writ of error " brought to reverse a judgment in a capital case, the " personal attendance of the defendants on the argument " or at the decision of the Appellate court is not necessary to give such court jurisdiction; and there was a " like ruling in *Donnelly* v. *State*, 2d Dutcher, 463; and " also in principal a like view in *Bues* v. *The State*, 18 " Mo., 318, and *Commonwealth* v. *Costello*, 121 Mass., " 371."

The inapplicability of the last citation must be manifest. We do not claim here, that it is necessary for a defendant to be present " on the argument or decision." Such is not our contention. Our contention is, that they must be present at the time of *sentence or award of execution.* And holding therefore that it is not necessary that a prisoner be present at argument or decision, does not in the least affect our contention.

Again, the State Supreme court says:

" It has not been the practice of this court, from its or-
" ganization to the present time, to have the plaintiff in
" error in a criminal case actually present in court at the
" hearing, and when final judgment is given."

If it be the requirements of the common law, that at the giving of "*final judgment*," as stated by the Supreme court, it be necessary to have plaintiff in error present, then the practice of the court cannot in any wise affect the decision of this court. A practice which is adopted and followed by a court not having the sanction of law, and although continuing unchallenged for many years, cannot prevail when such practice is questioned by a party who has a right to complain, as said by this court in *Boyd* v. *U. S.*, 116 U. S., 616.

This court, speaking by Mr. Justice BRADLEY:

" Is a search and seizure, or what is equivalent thereto,
" a compulsory production of a man's private papers, to
" be used in evidence against him in a proceeding to for-
" feit his property for alleged fraud against the revenue
" laws—is such a proceeding for such a purpose an '*un-*
" *reasonable* search and seizure' within the meaning of the
" fourth amendment of the constitution; or, is it a legitimate
" proceeding? *It is contended by the counsel for the gov-*
" *ernment, that it is a legitimate proceeding, sanctioned*
" *by long usage, and the authority of judicial decision. No*
" *doubt long usage acquiesced in by the courts, goes a long*
" *way to prove that there is some plausible ground or rea-*
" *son for it in the law, or in the historical facts which*
" *have imposed a particular construction of the law favor-*

"*able to such usage. It is a maxim that, consuetudo est*
"*optimus interpres legum; and another maxim that, contemporanea*
"*expositio est optima et fortissima in lege.*
"*But we do not find any long usage, or any contemporary*
"*construction of the constitution which would justify any*
"*of the acts of Congress now under consideration.* * *
"* Illegitimate and unconstitutional practices get their
"first footing in that way, namely, by silent approaches
"and slight deviations from legal modes of procedure.
"This can only be obviated by adhering to the rule that
"constitutional provisions for the security of person and
"property should be liberally construed. A close and
"literal construction deprives them of half their efficacy
"and leads to gradual depreciation of the right as if it
"consisted more in sound than in substance. *It is the*
"*duty of courts to be watchful for the constitutional rights*
"*of the citizen, and against any stealthy encroachment*
"*thereon. Their motto should be, obsta principiis.*"

These views expressed by this court where a constitutional right is involved as here, control, and although it be the opinion of a State Supreme court, which is questioned, cannot be upheld, as it must result, in depriving the parties here of their constitutional rights, and the practice of the State Supreme court must be held to be contrary to the constitution unfounded and unauthorized in law.

Again, the State Supreme court, in its opinion by Justice Schofield, says that the parties now before this court by not moving to obtain a rehearing in the State Supreme court and thereby securing the right of being present at the time of sentence, "voluntarily waived it."

Where the life or liberty of a person is involved and is submitted to the determination of a court there can be no waiver of any of his rights. He stands upon all his rights, and the court is bound to see that the requirements of the law in all respects are observed and carried into effect, and it is no answer to say that a party or his counsel has "waived" his right. Upon this question this court has expressed its views very fully in the case of *Hopt* v. *Utah*, 110 U. S., 574, where this court, speaking by Mr. Justice HARLAN, said: "It is said that the right "of the accused to be present before the triers was "waived by his failure to object to their retirement from "the court room, or to their trial of the several challenges "in his absence. We are of opinion that it was not within "the power of the accused or his counsel to dispense "with the statutory requirement as to his personal pres-"ence at the trial. The argument to the contrary neces-"sarily proceeds upon the ground that he alone is con-"cerned as to the mode by which he may be deprived, "of his life or liberty, and that the chief object of the "prosecution is to punish him for the crime charged. "But this is a mistaken view as well of the relations "which the accused holds to the public as of "the end of human punishment. The natural life "says Blackstone, 'cannot legally be disposed of or de-"stroyed by any individual, neither by the person him-"self, nor by any other of his fellow creatures, merely "upon their own authority.' (1 Bl. Com., 133.) The "public has an interest in his life and liberty. Neither "can be lawfully taken except in the mode prescribed by "law. That which the law makes essential in proceed-"ings involving deprivations of life or liberty cannot be "dispensed with or affected by the consent of the ac-"cused, much less by his mere failure when on trial and "in custody, to object to unauthorized methods. The "great end of punishment is not the expiation or atone-

"ment of the offense committed, but the prevention of "future offenses of the same kind. (4 Bl. Com., 11.) "Such being the relation which the citizen holds to the "public, and the object of punishment for public wrongs, "the legislature has deemed it essential to the protection "of one whose life or liberty is involved in a prosecution "for felony, that he shall be personally present at the "trial, that is, at every stage of the trial when his substantial rights may be affected by the proceedings "against him. If he be deprived of his life or liberty "without being so present, such deprivation would be "without that due process of law required by the constistitution. For these reasons we are of opinion that it "was error which vitiated the record and judgment, to "permit the trial of the challenges to take place in the "absence of the accused."

We close this branch of the brief without at this stage of the argument calling the attention of the court to the recitals of the respective records and their fatal errors, not desiring needlessly to repeat, we respectfully ask the court in connection with this branch of the argument to consider what is said under division III, subhead E.

III.

Is Schwab's detention and confinement, as shown by the allegations of the petition, and the exhibits thereto attached and admitted by the demurrer filed thereto by the warden of the penitentiary, as appears from the record, not in violation and controvention of the constitution of the United States?

A.

The petition in this case shows that the warden of the penitentiary holds, and the demurrer filed thereto admits, that his only authority is the following: Transcript of record, Schwab's case, page 8, Exhibit " A ":

" STATE OF ILLINOIS,
EXECUTIVE DEPARTMENT. }

Richard J. Oglesby, Governor of Illinois, to Canute R. Matson, Sheriff of Cook County, Illinois, greeting:

Whereas, Michael Schwab was convicted at the June term, A. D. 1888, of the Criminal court of Cook county, of the crime of murder and was sentenced therefor to be hanged, and whereas, it has been represented to me by divers good citizens of said county that said Michael Schwab is a fit and proper subject for executive clemency.

Now, know ye, that I, Richard J. Oglesby, governor of Illinois, by authority in me vested by the constitution of this State, do by these presents commute the sentence of the said Michal Schwab to imprisonment in the penitentiary for life.

In testimony whereof, I hereto set my hand and cause to be affixed the great Seal of State.

Done at the city of Springfield this 10th day of November, in the year of our Lord one thousand eight hundred and eighty-seven, and of the independence of the United States the one hundred and twelfth.

(Seal of State.) (Sig.) RICHARD J. OGLESBY,
Governor.

By the Governor:
(Sig.) HENRY D. DEMENT,
Secretary of State.

Executed by delivering the body of the within named defendant to the warden of the penitentiary at Joliet this 12th day of November, 1887.

(Sig.) CANUTE R. MATSON, *Sheriff.*
By W. H. GLEASON, *Deputy.*

WARDEN'S OFFICE, ILLINOIS STATE PENITENTIARY.

JOLIET, May 2, 1890.

This is to certify that the within and foregoing is a true and correct copy of an original document on file in the office with commitment papers of convict Michael Schwab.

GALLUS MULLER,
Clerk Ill. State Penitentiary."

Exhibit B, Schwab's transcript of record, page 9, is as follows:

" STATE OF ILLINOIS, EXECUTIVE OFFICE.

SPRINGFIELD, November 10th, 1887.

Maj. R. W. McClaughry, Warden Illinois State Penitentiary, Joliet, Illinois.

SIR: I have this day commuted the sentence of Samuel Fielden and Michael Schwab, under the sentence, at the June term, A. D. 1887, of the Criminal court of Cook county, of death, to be hanged for the crime of murder, to imprisonment of the said Samuel Fielden and Michael Schwab in the penitentiary for life.

The commutation papers will this day be forwarded by me to the sheriff of Cook county, Illinois, directed to Canute R. Matson, Sheriff of said county, with instructions to him to deliver said Fielden and Schwab into your custody as warden of the Illinois penitentiery at Joliet, together with the commutation papers in each case. You will receive the said Samuel Fielden and Michael Schwab, as warden of said pentitentiary, into your custody, whereby under said commutation you are hereby directed to receive said Samuel Fielden and Michael Schwab, into your custody as warden of said penitentiary, and to confine the said Fielden and Schwab in said penitentiary, in safe and secure custody and keeping, at hard labor during the term of their natural lives.

The said commutation papers would have been sent, as is usual directly to you. I desired, however, that the sheriff might temporarily have said papers in his possession on the day when said Fielden & Schwab, with several other persons, named in said sentence which was pronounced against them, were to be executed on the 11th day of November, 1887, that he might be able by said papers to show why the sentence of said Samuel Fielden and Michael Schwab was not carried in to execution, as pronounced by said court against them.

Yours respectfully,

R. J. OGLESBY.

WARDEN'S OFFICE, ILLINOIS STATE PENITENTIARY.

JOLIET, May 2d, 1890.

This is to certify that the within and foregoing is a true and correct copy of an original document on file in this office with commutation papers of convict, Michael Schwab.

GALLA MULLER,
Clerk Illinois State Penitentiary."

Exhibit C, page 9, Schwab's transcript of record, reads:

"At a Supreme court begun and held at Ottawa, on Tuesday, the 6th day of September, in the year of our Lord one thousand eight hundred and eighty-seven, within and for the Northern Grand division of the State of Illinois.

Present: Benj. R. Sheldon, chief justice; John M. Scott, justice; John H. Mulkey, justice; Simeon P. Shope, justice; John Scholfield, justice; Alfred M. Craig, justice; Benjamin D. Magruder, justice; George Hunt, attorney general; Lawrence Morrissy, sheriff; Alfred H. Taylor, clerk.

Wednesday, September 14.

Present: Full bench, except Mr. Justice Scott.

Be it remembered that afterwards, to wit: on the 14th day of September, A. D. 1887, (the same being one of, the regular days of said term of court), the following proceedings were by said court, had and entered of record to wit:

August Spies, Michael Schwab, Samuel Fielden, Albert R. Parsons, Adolph Fischer, George Engel, Louis Lingg and Oscar W. Neebe, *vs.* The People of the State of Illinois.	*59, A. D. Error to the Criminal Court of Cook County.*

On this day came again the said parties, and the court having diligently examined and inspected, as well the record and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the court now here, that neither in the record nor proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and that that record is no error:

Therefore it is considered by the court that the judgment aforesaid be affirmed in all things as to each and every of said plaintiffs in error, and stand in full force and effect, notwithstanding the said matters and things therein assigned for error; and it is further ordered by the court that the eleventh day of November, A. D. 1887, be and the same is hereby fixed as the time when the sentence of death pronounced upon said plaintiffs in error, August Spies, Michael Schwab, Samuel Fielden, Albert R. Parsons, Adolph Fischer, George Engel and Louis Lingg, by the Criminal court of Cook county, Illinois, shall be executed.

And it is further ordered by the court that the sheriff of Cook county, Illinois, be, and he is hereby, ordered and directed to carry into execution the sentence by the Criminal court of Cook county, Illinois, of the defendants in the indictment, August Spies, Michael Schwab, Samuel Fielden, Albert R. Parsons, Adolph Fischer, George Engel and Louis Lingg, on Friday, the eleventh day of November next (November 11, A. D. 1887), between the hours of ten o'clock in the forenoon and four o'clock in the afternoon of that day.

And it is further considered by the court that the said defendants in error recover of and from the said plaintiffs in error their costs by them in this behalf expended, and that they have execution therefor.

STATE OF ILLINOIS, ss.

SUPREME COURT, NORTHERN GRAND DIVISION.

I, Alfred H. Taylor, clerk of the Supreme court in and for the Northern grand division of the State of Illinois, and keeper of the records and seal thereof, do hereby certify that the foregoing is a true copy of the final order in the above entitled cause, of record in my office.

In testimony whereof, I have set my hand and affixed the seal of the said Supreme court, at Ottawa, this 12th day of November, in the year of our Lord one thousand eight hundred and eighty-seven.

(Sig.) A. H. TAYLOR,
(Seal of Supreme Court.) *Clerk of the Supreme Court.*

WARDEN'S OFFICE, ILLINOIS STATE PENITENTIARY,
JOLIET, May 21st, 1890.

This is to certify that the within and foregoing is a true and correct copy of an original document on file in this office, with commitment papers of convict, Michael Schwab.

GALLA MULLER,
Clerk Illinois State Penitentiary.

EXHIBIT "D."

UNITED STATES OF AMERICA, }
STATE OF ILLINOIS, COOK COUNTY. } ss.

Pleas before a branch of the Criminal court of Cook County, in said county and state, at a term thereof begun and held at the Criminal court house, in the city of Chicago, in said county, on the first Monday (being the fourth day) of October, in the year of our Lord one thousand eight hundred and eighty-six, and of the independence of the United States, the one hundred and eleventh.

Present: Honorable Joseph E. Gary, judge of the Superior court of Cook county and *ex officio* judge of the Criminal court of Cook county; Julius S. Grinnell, state's attorney; Seth F. Hanchett, sheriff of Cook county.

Attest: JOHN STEPHENS, *Clerk.*

Be it remembered, to wit: on the ninth day of October, in the year last aforesaid, it being the term of court aforesaid, the following, among other proceedings, were had and entered of record in said court; which said proceedings are in the words and figures following, to wit:

The People of the State of Illinois *vs.* Michael Schwab, Impl'd, etc.	*18,803. Indictment for murder.*

This day again come the same people, by Julius S. Grinnell, state's attorney, and the said defendant, as well in his own proper person as by his aforesaid counsel, also comes; and now neither the said defendant nor his counsel for him saying anything further why the judgment of the court should now be pronounced against him on the verdict of guilty heretofore rendered to the indictment in this cause.

Therefore it is ordered and adjudged by this court that the said defendant, Michael Schwab, be taken from the bar of the court to the common jail of Cook county, from whence he came, and be confined in said jail in safe and secure custody until the 3d day of December, A. D. 1886, and that on said third day of December, between the hours of 10 o'clock in the forenoon and 2 o'clock in the afternoon, the said defendant, Michael Schwab, be by the sheriff of Cook county, according to law, within the walls of said jail or in a yard or enclosure adjoining the same, hanged by the neck until he is dead, and the said sheriff is hereby required and commanded to take the body of the said defendant, Michael Schwab, and confine him in the said common jail of Cook county in such safe and secure custody, and upon the said 3d day of December, A. D. 1886, between the hours of 10 o'clock in the forenoon and 2 o'clock in the afternoon, to hang the said defendant, Michael Schwab, by the neck until he be dead.

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

I, James H. Gilbert, clerk of the Criminal court of Cook county, in said county and state, do hereby certify the above and foregoing to be a true, perfect and complete copy of an order entered of record in a certain cause lately pending in said court, wherein the people of the State of Illinois were plaintiffs and Michael Schwab, impld., &c., were defendants.

Witness, James H. Gilbert, clerk of said court, and the seal thereof at Chicago, in said county, this 5th day of November, A. D. 1887.

[SEAL CRIMINAL CT.
COOK COUNTY, ILLINOIS.]

(Sig.) JAMES H. GILBERT, *Clerk*.

ILLINOIS STATE PENITENTIARY.

WARDEN'S OFFICE, JOLIET, October 4, 1890.

This is to certify that the above and foregoing has been carefully compared with and is a true and correct copy of an original final order of the Criminal court of Cook county on file in this office *in re* "The People of the State of Illinois *vs.* Michael Schwab."

A. W. BERGGREN, *Warden*.

Of the exhibits, the only paper which the warden can pretend is colorable authority for detaining the relator, is that issued by the governor under the Seal of the State. But that paper is no lawful warrant.

We invite the court to an examination of these exhibits, and we maintain that none of them can be taken or construed by the court as any authority whatever, for relator's detention, excepting Exhibit "A", the provisions of which we shall refer to hereafter.

Exhibit B, as will be observed, is a private letter of R. J. Oglesby, addressed to the warden of the penitentiary. It does not purport to be an official document. It does not purport to emanate from the governor. It does not have affixed to it, as required by law, the seal of the state, to indicate that it is claimed to be an official document, and can, therefor, in no sense, constitute an authority to the warden of the penitentiary for the detention of the relator.

Exhibit C is, as it purports to be, merely a certified copy of a judgment of the Supreme court of the State of Illinois, sentencing the relator, Schwab, together with others, to be executed. It neither refers to the warden of the penitentiary nor directs confinement of the relator there, nor is, in any sense, a warrant for the imprisonment for life in the penitentiary of the relator.

The criticism of Exhibit " B " applies also to Exhibit " D ". This brings us, therefore, to a consideration of the only document which can be claimed by the warden as constituting any authority whatever for the detention of the relator in the penitentiary.

That Exhibits " B ", " C " and " D " constitute no authority, and that the only authority or only pretended authority, which can be asserted for detaining the relator, is the commutation of the governor, herein referred to as Exhibit " A ", see:

> *Ex parte* Wells, 18 Howard, 307, where it is said:

Opinion by Justice McLean, dissenting from the court on the principal proposition, the majority of the court agreeing with him, however, in the following quotation: " It is said the convict is now in prison under the original " sentence of the court. So far as that sentence goes, the " man is presumed to have been hung in April, 1852, but " it is insisted that the president had power to reprieve " from the sentence of death. This is admitted, but no " reprieve has been granted. On the contrary, an act has " been done entirely inconsistent with a reprieve, as that " only suspends the punishment for a fixed period. The " punishment of death has been commuted for confinement to hard labor in the penitentiary for life. It is "perversion of the facts to say that Wells has been re-"prieved by the president; nor can it be said that he is "now in confinement under a sentence of death. The "sentence of death has been commuted for confinement. "Since 1852 the sentence has been abrogated in effect; "for if the president had power to commute the crime, "the sentence is at an end. The culprit is detained in "prison under this commutation of the president, which "the Circuit court held he had the power to do and re-"manded the prisoner on that ground, and whether this "be legal is the inquiry on the *habeas corpus*. It does not "reach the original sentence of the court. That sentence "is considered only as the ground of commutation. And "if the president had no power to make it, the detention "of Wells is illegal. Is this not a legitimate subject of "inquiry on a *habeas corpus?* It has been held to be a "legal detention by the Circuit court and this opinion of "the Circuit court is brought before us on the *habeas cor-"pus* as the only cause of detention."

We maintain that the supposed authority of Exhibit "A" is in fact no authority whatsoever, because:

1. The writing or supposed authority is not directed to the warden.

2. The writing or supposed authority does not authorize the warden to detain the relator in imprisonment.

3. The writing or pretended authority does not specify or direct the imprisonment of the relator in any penitentiary of the State of Illinois. The writing and authority does not and did not give warrant and authority to Canute R. Matson, sheriff of Cook county, Illinois, to deliver the body of the petitioner into the custody and keeping of the warden of the penitentiary, at Joliet.

4. The writing or pretended authority does not impose upon relator that he be kept at hard labor. (Schwab Rec., page 2.)

It appears from the allegation of the petitioner that the relator is kept at hard labor in the penitentiary.

By the statute of Illinois, now as then in force, Ch. 38 Rev. Stat. of Ill., Hurd's Ed., section 444, it is provided:

"In all cases where the punishment shall be confinement "in the penitentiary, if the case is tried by a jury the jury "shall say in their verdict for what time the offender shall "be confined, and the court in pronouncing the sentence "shall designate what portion of time the offender shall "be confined to solitary imprisonment and what portion "to hard labor."

This commutation of the governor does not require, nor is it therein stated, that the relator shall be kept at hard labor, yet, notwithstanding, it is not imposed upon him by the terms of the commutation, it is admitted that he is kept at hard labor.

In Vol. 1 Burn's Justice of the Peace, page 779, it is said:

"The commitment shall be directed to the gaoler or "keeper of the prison and not generally to carry the "party to prison, citing: 2 Hawk., ch. 16, s. 13; *R.* v. "*Smith*, 2 Stra., 934; *R.* v. *Fell*, 1 Lord Raymond, 424.

"It is usually directed to the constable and to the keeper "of the prison to which the party is to be committed. * "* *

"The warrant must be directed to the proper gaoler, "and is bad if it only orders in general terms that the "defendant be carried to prison.

"*R.* v. *Smith*, 2 Str., 934."

In the case of *Rex* v. *Smith*, it is decided:

"He came up from Oxford gaol on a habeas corpus, "and appeared to be committed for want of sureties, in "an action in the Vice-Chancellor's court, for injury "and damage to the value of £1,000, and by "warrant the beadles of the university were required to "carry him to prison. *And now on motion he was dis-"charged. First, because the warrant was not directed "to any gaoler, but was only generally to carry him to "prison*, and, Secondly, because it did not appear the "plaintiff had made any affidavit of a debt, without "which the court below could not hold him bail."

In Paley on Convictions, page 334, it is said:

"*If the statute orders a commitment with hard labor it "must be so specified in the warrant.*" And again it is said Paley on Convictions, page 319: "The warrant of "commitment is a precept in writing under the hand and "seal of the justice directed to the constable and to the "keeper of the prison to which the party is to be com-"mitted. * * * The warrant must be directed to the pro-"per gaoler and is bad if it only refers in general terms "that the defendant be carried to prison."

So this court has said in *Ex parte* Karstendick, 93 U. S., page 396, by Chief Justice Waite: "In cases where "the statute makes hard labor a part of the punishment "it is imperative upon the court to include that in its "sentence."

Above case is cited in *Ex parte* Mills, 135 U. S., 263. See, also,

In re Johnson, Vol. 46, Fed. Rep., 481.
Ex parte. Burres, 136 U. S., 586.

In re Kelley, 46 Fed. Rep., 653.
In re Monroe, 46 Fed. Rep., 53.

See cases quoted in Appendix D.

B.

Process required to run in the name of the people.

A further objection to the validity of the imprisonment under the supposed authority of Exhibit A, is that, by the Constitution of the State of Illinois, it is provided, Art. VI, Sec. 33:

"All process shall run in the name of the People of "the State of Illinois, and all prosecutions shall be car- "ried on in the name and by the authority of the People "of the State of Illinois."

The process, or supposed authority which is in the nature of process held by the warden of the penitentiary, as justifying the detention of the relator, does not comply with the constitutional requirement, nor do any one of the documents known as "A," "B," "C" or "D" contain the requirements of the constitution. This requirement, which has been held by the Supreme court of the State of Illinois is imperative. See

Leighton v. *Hall*, 31 Ill., 110.
Sidwell v. *Schumacher*, 99 Ill., 437.
Armsly v. *Payne*, 20 Ill., 155.

C.

Only when sentenced by a court of competent jurisdiction is a person to be confined in the penitentiary.

The detention of the relator in the penitentiary, aside from the objections presented hereinabove, is entirely without warrant and in direct violation of law, and a clear invasion of the relator's rights under the Constitution of the United States, and especially of the provisions of the Fourteenth amendment. By the Revised Statute of Illinois it is provided:

Revised Statutes of Illinois, Chap. 108, p. 993, Sec. 1:

"Be it enacted by the People of the State of Illinois, "represented in the General Assembly, That the penitentiary at Joliet, in the county of Will, until otherwise provided by law, shall be the general penitentiary and prison "of this State for the confinement and reformation as "well as for the punishment *of all persons sentenced by* "*any court of competent jurisdiction in this State*, for the "commission of any crime, the punishment of which is "confinement in the penitentiary, *in which the person so sentenced* shall be securely confined, employed at hard labor, "and governed in the manner hereinafter directed."

This statute providing, as will be observed upon the reading, that it is only upon the sentence of a court of competent jurisdiction that a person may be confined in the penitentiary, What authority has the governor for sentencing or directing that a person be confined in the penitentiary? Assuming, therefore, that in this instance the governor had given explicit directions to the sheriff of Cook county to convey the relator to the penitentiary, and also given same directions to the warden of the penitentiary to receive and retain the relator and keep him at hard labor, and that such commitment had been in form regular in all respects, a detention or confinement in the penitentiary upon the authority of the governor would be of no more avail as a justification or authority for the acts of the warden in detaining the relator than would be a command of a justice of the peace or of a mayor of a city, for, by the provisions of the statute, it is expressly required that the confinement shall be upon "*the sentence of a court of competent jurisdiction.*" The governor, therefore, being without authority to commit to the penitentiary, the warden is equally without authority to detain him, and the relator is, therefore, entitled to his discharge.

See *in re* Nielson, 131 U. S., 176.
In re Snow, 120 U. S., 74.
Ex parte Lange, 85 U. S., 163.
Ex parte Milligan, 71 U. S., 2.
Church on *Habeas Corpus*, Secs. 348–362, 363.
In re Kelly, Vol. 46, Fed. Rep., 653.
In re Monroe, 46 Fed. Rep., 53.
Ex parte Burres, 136 U. S., 586.

See also Appendix E.

D.

The judgments are void, they do not show a conviction for any crime for which a person might lawfully be put to death.

But again, the petition for *habeas corpus* filed herein shows that the authority of the warden for detaining the petitioner, Michael Schwab, is contained in the four exhibits annexed to the petition and found in the Schwab record. Of two of the exhibits one is a judgment of the Criminal court of Cook county, and the other is the judgment of the Supreme court of the State of Illinois, each commanding that the relator be put to death as therein commanded. The other exhibits are the commutation and the private letter of the governor. As hereinbefore stated, the private letter is entitled to no consideration whatever. The commutation can have no effect if the respective judgments be void. We insist that each of these judgments, and both of them are unlawful and void, and consequently confer no authority for the detention of the relator in prison, and are in violation of the constitution of the United States, amendments to the constitution, article 14, section 1, which provides "that "no state shall deprive any person of life, liberty or "property without due process of law, nor deny to any "person within its jurisdiction the equal protection of the "laws."

By the criminal code of the State of Illinois, no offense is subject to the punishment of death except the offense of murder.

Hurd's Rev. St., Crim. Code, Chap. 38.

By section 142 of that chapter it is provided:

"Whoever is guilty of murder, shall suffer the punishment of death, or imprisonment in the penitentiary for "his natural life, or for a term of not less than fourteen "years. If the accused is *found guilty by a jury they shall "fix the punishment by their verdict*, and upon a plea of "guilty the punishment shall be fixed by the court."

An examination of the judgment of the Supreme court fails to disclose that the relator, Michael Schwab, or the plaintiff in error, Samuel Fielden, was found guilty of murder or any other offense. So also an examination of the judgment of the Criminal court of Cook county (Schwab Rec., 17), fails to disclose that he (and the same applies to Fielden), was found guilty of murder or any other offense. Such being the fact the order of execution of Schwab and Fielden is contrary to law, and their detention in prison is contrary to law, and not due process of law.

Vol. 1 Burns, J. P., pp. 792, 793, 794.

Such judgments as these this court has had occasion to pass upon recently in the case of *Ball* v. *U. S.*, 140 U. S., 382, where this court, speaking by

Chief Justice **Fuller**, say:

" On November 15th, this order was filed: ' By reason " of the law and the evidence and the verdict of the jury " in this case, it is ordered and adjudged that the defendants, Robt. E. Boutwell and John C. Ball, be executed " by being hung, until each and either are dead, according " to the forms, delays and processes provided in the laws " of the United States. This done and signed in open " court November 15, 1889. Aleck Boarman, Judge.'

" It will be perceived that neither in the verdict, nor " the order of November 3d, nor that of November 15th, " is it stated of what offense the defendants were found " guilty. * * *

" The indictment charges an assault by the defendant " upon one William T. Box with a loaded gun, and the " infliction of mortal wounds by the discharge of its contents, ' of which mortal wounds the said William T. " Box did languish, and, languishing, died.' *This fails to " aver either the time or place of the death. By the common law both time and place were required to be alleged. " It was necessary that it should appear that the death " transpired within a year and a day after the stroke, and " the place of death equally with that of the stroke, had to " be stated, to show jurisdiction in the court. The controlling element which distinguished the guilt of the assailant* "*from a common assault was the death within a year and* "*a day, and also within the same jurisdiction.* Citing "authorities. * * * The accused is entitled to be "informed of the nature and cause of the accusation "against him, and jurisdiction should not be exercised "when there is doubt as to the authority to exercise it. "All the essential ingredients of the offense charged must "be stated in the indictment, embracing, with reasonable "certainty, the particulars of time and place, that the ac-"cused may be enabled to prepare his defense and avail "himself of his acquittal or conviction, against any further "prosecution for the same cause. Hence, even though "these defendants might have been properly tried in the "eastern district of Texas, if the fatal stroke were in-"eflicted there, though the death occurred elsewhere, it "nevertheless, the averment of the place of death would "still remain essential. And while it may be conceded "that as this indictment was found on the 17th day of "October, 1889, and the day of the assault is fixed as on "the 26th day of June of that year, and it is asserted that "Box died, the failure to aver the time of death is not "fatal, we hold that the omission to state the place is so. "By section 1,035, Rev. Stat., a party may be found "guilty of any offense the commission of which is neces-"sarily included in that with which he is charged in the "indictment, or may be found guilty of an attempt to "commit the offense so charged. The verdict found the "defendants guilty as charged, and the order of Novem-"ber 15th, used no other language. Defendants were "well charged with assault, but not with murder, and the "verdict must be held to have related only to that which "was well charged, upon which no such judgment as that "before us can be sustained. The judgments are re-

"versed and the cause remanded, with a direction to "quash the indictment."

See, also,

Black on Judgments, Vol. 1, Sec. 118.
People v. *Turner*, 1 Cal., 152.
1 Burns, J. P., pp. 779, 789 to 794,
Wharton on (Cr.) Ev., Sec. 594.

Applying these principles to the case at bar, and we insist that the same principles in all respects apply with equal if not greater force to a judgment as here than to an indictment as in the Ball case, it is clear that the judgments in the case at bar are wanting in every essential particular which the law demands within the meaning of "due process of law."

We respectfully submit that the first assignment of error, that the court erred in dismissing appellant's petition for a writ of error, and the court further erred in failing and refusing to discharge the relator from the custody of the warden of the penitentiary, and that on the authority of the decisions herein recited, the petitioner is entitled to the writ of *habeas corpus* and to his discharge.

We claim that wherever in a case in which a United State court has power to issue a writ of *habeas corpus* and a proper petition therefor is filed with the court, that a final hearing of the merits should not be had upon the petition alone, but that the *habeas corpus* should issue and the party brought into court at the hearing, especially in a capital case. This *and the* writs should not be refused, because if granted on the final hearing, the petitioner would have the benefit of the facts set out in the return of the party claiming to hold the petitioner in custody.

Those facts might be of exceeding importance. They might show matters which the petitioner would be quite unable to show, determining the result of the *habeas corpus*. If the writ does not issue, the petitioner is deprived of that advantage and benefit of due process of law. The error here is in the dismissing the petition so that the petitioner had not the advantage of this "great "writ of right," the only protection of the citizen against false imprisonment.

The constitution does not say that the citizen shall be entitled to "petition" for a writ of *habeas corpus*, but wherever he is imprisoned he is entitled to try the question by the writ of *habeas corpus*. Upon the petition alone he can only produce such proofs before the court as he can obtain while closely confined to hard labor; but the writ is a constitutional writ of right, and we contend should issue in order that imprisonment shall be determined in due process of law, and not upon the hearing of a petition wherein the foundation of the imprisonment is not shown by the return of the respondent.

E.

THE RECITAL IN THE RECORD AS TO PRESENCE ON THE WRIT OF HABEAS CORPUS IS NOT SUFFICIENT TO SHOW THAT THE RELATOR WAS PRESENT.

I.

The record on its face.

Is the petitioner in the *habeas corpus*, Michael Schwab, estopped by the recital in the record contained in the judgment of the state Supreme court, a copy of which judgment is attached to the petition, and marked "Exhibit A" in this proceeding, from questioning the jurisdiction of the state Supreme court? We respectfully submit that he is not. The recital in the record, so far as it is pertinent to this discussion, Exhibit A, is as follows, the judgment first giving the names of the parties to the cause, begins with this recital: "On this day *come again* "*the said parties.*" (Schwab Rec., p. 10.) There is no other reference, allusion or designation as to the parties in the suit, contained in the judgment, as will appear from an examination. Of this recital, it is true, this court said, when the original cause of Spies *et al.*, 123 U. S., 131, was before this court, "the objection that the defendants "were not actually present in the Supreme court of the "state at the time sentence was pronounced, cannot be "made on the record as it now stands, because on its face "it shows they were present. If this is not in accordance "with the fact, the record must be *corrected below* "(state Supreme court), not here. It will be time enough "to consider whether the objection presents a federal "question when the correction has been made," per Chief Justice Waite.

This statement by this court was made without a full discussion or full argument as to the sufficiency of this recital as contained in its record to establish the presence of the relator before the Supreme court, and this statement was made without that full consideration that it oughtto have received by this court, and was in answer to a motion made by the relator in this case and others, co-plaintiffs in error in Spies *et al.*, for the allowance of a writ of error, and at the time of making the motion this feature contained in the record was not fully presented. This court has, however, in *Ball* v. *U. S.*, 140 U. S., 382, since the decision in *Spies* v. *The People*, again considered the sufficiency of the recitals of a judgment and sentence of death, and while not expressly referring to the case of *Spies* v. *The People*, in this court, has by implication by construing and passing upon the sufficiency of the record in *Ball* v. *U. S.*, expressly overruled the authority of Spies case, and therefore, upon the authority of *Ball* v. *U. S.*, we insist that the recitals of the judgment contained in the petition herein are not conclusive against the relator Schwab, nor is he prevented by the recitals from questioning the jurisdiction of the State Supreme court. The decision in *Ball* v. *U. S.* is in harmony with other decisions where the question was raised as here. By way of anticipation of argument we submit that it is no answer to this contention that *Ball* v. *U. S.* is a case wherein a writ of error issued to a United States court in a case where the trial was had in such court, the question here involved not being nor arising under state laws and over which the state alone has jurisdiction or is the sole arbiter. The question has a broader foundation than state interpretation. The rights which the relator Schwab claims are not questions arising out of state laws, but are rights guaranteed to him by a treaty and constitutition of the United States, and, therefore, where, as in this case, the constitutional rights are violated by a state court or by a federal court, is immaterial. The question is, have they been violated at all, and if so, by whatever court they may be violated, they are to be construed by this court, as it has been construed in the case of *Ball* v. *U. S.* In that case this court said, speaking by Chief Justice FULLER, quoting from *Hamilton* v. *Commonwealth*, 16 Pa. St., 129, by Chief Justice GIBSON:

"We find no entry that the prisoner was demanded, "whether he had anything to say why sentence of "death should not be pronounced on him, the absence of "which was ruled in *Rex* v. *Geary*, 2 Salk., 630, and "*King* v. *Speke*, 3 Salk., 358, to be fatal. In fact, there "is nothing on the docket to show even that the prisoner "was present when he was sentenced, except the supplementary memorandum that 'he was present in court "during every stage of the trial, from the time of his arraignment up to the time when the sentence was passed "by the Honorable Ellis Lewis, President Judge of the "court, on him. Indeed, the whole trial, from its commencement to its termination, was according to law.' "A record is constituted of proper and legitimate elements set down in their order; for it is certainly not "law that all the gossip a clerk or prothonotary writes "down in his docket, *ipso facto* becomes the very voice "of undeniable truth. The judges of a court of error "must determine for themselves, and consequently on "facts, instead of sweeping assertions. The premises, "to found a sentence of death are set forth in 1 Ch. "Crim. L., 720, and the form of the entire record is "given in 4 Bl. Com. app. 1, in which there is a demand "of the prisoner, 'if he hath or knoweth anything to say "wherefore the said justices ought not, on the premises "and verdict, to proceed to judgment and execution "against him,' together with his answer, that he 'nothing "further saith, unless as he before had said. The forms "of records are deeply seated in the foundations of the "law; and as they conduce to safety and certainty, they "surely ought not to be disregarded when the life of a "human being is in question. Our practice of rotation "has excluded experience from the county offices, and it "would perhaps, be profitable were the presiding judge

" to superintend the entries. It would at least prevent " our judicial records from becoming entirely barbarous."

This court then states reasons as contained in *Fielden* v. *The People*, 128 Ill., 595, why he should have been present.

This court also refers to the case of *Gannon* v. *The People*, 127 Ill., 507, wherein the State Supreme court decided that it was not error to fail to call upon the defendant " what he hath to say," etc. The court, however, as we understand the decision, expressly dissents from the holding of the State Supreme court, saying, " the " great weight of authority is the other way."

If, then, we correctly understand the decision in *Ball* v. *U. S.*, in passing upon the case of Fielden our contention, as above made, with reference to the presence of the defendant is expressly upheld and the determination of the Fielden case by the state court is overruled.

To return, however, to the facts contained in the case of *Ball* v. *U. S.*, in reference to the recital contained in the record therein and comparing it with the recital contained in the case at bar: In the Ball case the recital was, " By " reason of the law and the evidence and the verdict of " the jury in this case, it is ordered and adjudged that the " defendants, Robert E. Boutwell and John C. Ball be " executed by being hung until each and either are dead, " according to the forms, delays and processes provided " in the laws of the United States. This done and signed " in open court November 15, 1889. Aleck Boarman, " Judge."

And the record further recites, " This day the defend- " ants in open court except to the sentence of the court " this day pronounced upon them."

And in the order of the 18th of July, 1890, the order was, "it is therefore ordered, adjudged and decreed."

This court, referring to the order of November 15th, say: "It does not appear, nor in our opinion is it fairly "deducible from the record, that the defendants were "present when the latter order was entered, and it is not "pretended that they were asked, or either of them, "what they had to say why sentence of death should not "be pronounced upon them. It is true that the record of "November 15th has this entry: 'This day the defend-"ants in open court excepted to the sentence of the court "this day pronounced upon them'; but that admits fairly "of the construction that the exception was entered by "their attorneys, as does the motion in arrest, which, "though it states that the defendants came in their own "proper person and by attorney, is signed only by the "attorneys, * * * we do not think that the fact of "the presence of the prisoners can by fair intendment be "collected from the record, no mention being made to "that effect in the order, it not appearing therefrom that "the sentence was read or orally delivered to them and "the usual question not having been propounded."

It will be observed that the recital in the record in Ball's case is much stronger in that as the record in that case recites, "that the defendants came in their own "proper person and by attorney," while in the Schwab case the record recites only "on this day come again the "said parties." If, therefore, this court will not accept the recital in Ball's case as a sufficient statement that the defendant was personally present when the recital is only "the defendants come in their own proper person" *a fortiori*, will it not be presumed that the parties to this case were personally present at the time of the sentence when the recital in the record is merely "on this day "come again the said parties"?

Again, in *State* v. *Matthews*, 20 Mo., 55, it is said: "A "judgment of conviction in a criminal case cannot be "sustained where the record does not show that the de-"fendant was ever in court at all after the verdict."

Again, in *Scoggs* v. *The State*, 8 M. & M. (Miss.), 722, "in case of murder the record must show affirmatively "that the accused was present during the whole trial."

Again, in *Kelly* v. *The State*, 3 S. & M. (Miss.), 518, "sentence of the court pronounced in absence of prisoner "in error is erroneous. The presence is essential to the "validity of such sentence."

Again, "personal presence of prisoner in court when "sentence pronounced absolutely necessary, and the re-"cord must show it." *Gibson* v. *The State*, 39 Ala., 393; *Graham* v. *The State*, 40 Ala., 630.

In *Eliza* v. *The State*, 39 Ala., 64, the court hold the following recitals not sufficient to show process, "this day "come the solicitor and the defendant," and "it is, there-"fore, considered by the court," etc., "that the defendant "be taken hence to the jail of the county," etc.

Again, Chief Justice MARSHALL held in *Mead* v. *D. M.*, 1 Brock., 324, "the sentence of a court martial with-"out notice is void."

Again, *Hamilton* v. *Commonwealth*, 16 Pa. St., 129, Chief Justice GIBSON held in case of indictment for murder, "it should appear from the record that the "prisoner was present in court when he was sentenced to "be executed, and it should be demanded of him whether "he has anything to say why sentence of death should "not be pronounced upon him," and the prisoner was discharged on *habeas corpus*, citing 1 Chitty Crim. L., 720; 4 Bl. Com. app., 1; *Dunn* v. *Com.*, 5 Barr, 384; *Rex* v. *Geary*, 2 Salk., 630; *King* v. *Speke*, 3 Salk., 358.

In *Dunn* v. *Commonwealth*, 6 Pa. St. Rept., 5 Barr., 384, the court held, where the record recited, "the court "sentenced George Dunn, the defendant, to be taken, "etc., whence you came," that it was not sufficient evidence of his presence at the passing of the sentence, citing only American cases—the rule being well settled in England; *State* v. *Tanner*, 1 Overton. 134; *Doubler* v. *Com.*, 3 Serg. and Rawle, 237, and *Jacobs* v. *Com.*, 4 Serg. and Rawle, 315.

In Wharton's Criminal Practice and Pleadings, section 906, it is said: "At common law in all felonies, when "capital, the practice has been for the clerk, before sen- "tence is pronounced, to ask the defendant if he has "anything to say why sentence should not be pronounced, "*and it is essential that it should appear on record that* "*this was done*," citing many cases.

We submit that these authorities fully establish the right of the relator to question on *habeas corpus* the jurisdiction of the State Supreme court, and that the recital contained in the judgment annexed to the petition is insufficient to estop him from so doing.

2.

A distinction is also made in courts of general jurisdiction and courts of limited jurisdiction when the recital contained in a judgment of the court is claimed to be conclusive. The Supreme court which passed the judgment in this case upon the relator Schwab is a court of limited jurisdiction, being vested and having the right and powers only of an Appellate court or court of review with original jurisdiction only in cases of mandamus, *habeas corpus*, and a few other matters not mentioned here. The constitution and statute which defines and limits the jurisdiction of the State Supreme court is as follows:

Constitution, article 6, section 2, title Supreme court: "The Supreme court shall consist of seven judges, and "shall have original jurisdiction in cases relating to the "revenue, in mandamus and *habeas corpus*, and appellate "jurisdiction in all other cases."

The statutes provide (Hurd's edition, Chap. 37, Sec. 7): "The Supreme court shall be vested with all power "and authority necessary to carry into complete execu-"tion all its judgments, decrees and determinations in all "matters *within* its jurisdiction, according to the rules "and principles of the common law and of the laws of "this state."

SECTION 8. "It may issue writs of mandamus, habeas "corpus, certiorari, error, and supersedeas, and all other "writs not prohibited by law which may be necessary to "enforce the due administration of justice in all matters "within its jurisdiction."

It therefore appears from the constitutional and statutory regulations, if the Supreme court have power at all to pronounce a judgment and sentence of death against the parties in this case, it acts and is bound by the same rules of law as any other court of *limited* jurisdiction, and no intendments are to be taken in favor of the recitals of the record except such as expressly appear or by necessary implication result, and all intendments are to be against the jurisdiction of the Supreme court, and this, too, notwithstanding it be the highest court in the state. Its jurisdiction, acting within its orbit, is as much confined as is the jurisdiction of a justice of the peace. In other words‘ the Supreme court is not a court of general jurisdiction. The law governing a court such as the Supreme court is as follows:

Cooley's Constitutional Limitations, page 508.

“ When the question is raised whether the proceed- ”
“ ings of a court may not be void for want of jurisdic- ”
“ tion, it will sometimes be important to note the grade ”
“ of the court and the extent of its authority. Some ”
“ courts are of general jurisdiction, by which is meant ”
“ that their authority extends to a great variety of mat- ”
“ ters; while others are only of special and limited juris- ”
“ diction, by which it is understood that they have au- ”
“ thority extending only to certain specified cases. The ”
“ want of jurisdiction is equally fatal in the proceedings ”
“ of each; but different rules prevail in showing it. It is ”
“ not to be assumed that a court of general jurisdiction ”
“ has in any case proceeded to adjudge upon matters ”
“ over which it had no authority; and its jurisdiction is ”
“ to be presumed, whether there are recitals in its ”
“ records to show it or not. On the other hand, no such ”
“ intendment is made in favor of the judgment of a court ”
“ of limited jurisdiction, but the recitals contained in the ”
“ minutes of proceedings must be sufficient to show that ”
“ the case was one which the law permitted the court to ”
“ take cognizance of, and that the parties were subjected ”
“ to its jurisdiction by proper process.”

Ex parte Nielson, 131 U. S. Supreme Court Repts., page 176, opinion by Mr. Justice Bradley:

"The first question to be considered, therefore, is "
"whether, if the petitioner's position was true, that he "
"had been convicted twice for the same offense, and that "
"the court erred in its decision, he could have relief by "
"habeas corpus."

"The objection to the remedy of habeas corpus, of "
"course, would be that there was in force a regular "
"judgment of conviction, which could not be questioned "
"collaterally, as it would have to be on habeas corpus. "
"But there are exceptions to this rule which have more "
"than once been acted upon by this court. *It is firmly* "
"*established that if the court which renders a judgment* "
"*has not jurisdiction to render it, either because the pro-* "
"*ceedings or the law under which they are taken are un-* "
"*constitutional, or for any other reason, the judgment is* "
"*void and may be questioned collaterally, and a defend-* "
"*ant who is imprisoned under and by virtue of it may be* "
"*discharged from custody on habeas corpus.*"

See, also,

Wharton Cr. Ev., 8th Ed., Secs. 578, 594, and authorities cited.

For other citations see Appendix "C."

Judged by the principles announced in the foregoing decisions, we submit the recital is not conclusive, the relator, Schwab, offered to prove, and his statement that he was not present at the time judgment was pronounced against him by the Supreme court is contained in his petition (Schwab, Rec., 5), and admitted by the demurrer of the attorney general filed to the petition admits upon the record that he was not present at the time judgment and sentence of death was given against him. It therefore, must be taken to stand as admitted, if our contention is upheld, that it was necessary that he should be present, that the court was without jurisdiction, and it, therefore, follows that his imprisonment under authority of such a judgment or any other process based upon such a judgment is unconstitutional and void.

IV.

THE SUPREME COURT WAS WITHOUT JURISDICTION TO MAKE OR ENTER A VALID SENTENCE OR ORDER THAT EITHER OF THE PARTIES BEFORE THE COURT BE PUT TO DEATH.

We insist that in passing judgment and sentence of death upon both the parties now before this court, the Supreme court of the State of Illinois acted without authority of law and exceeded its clearly defined jurisdiction, and its act is null and void and in violation of the constitution of the United States, providing that no state shall deprive any person of life, liberty or property without due process of law.

The constitution of the State of Illinois adopted in 1870 Art. VI, sec. 2, quoted herein above "confers original "jurisdiction upon the Supreme court 'only in cases' "relating to the revenue, in mandamus and habeas corpus, "and appellate jurisdiction in all other cases." Manisfestly in sentencing and pronouncing judgment of death and directing the sheriff of Cook county to execute the parties Schwab and Fielden now before this court, the Supreme court was not acting in a revenue or mandamus or habeas corpus case; nor were they then exercising appellate jurisdiction in any other case. We insist the pronouncing of judgment and awarding execution of death by the Supreme court was the exercise by that court of an original jurisdiction which was not conferred upon it, which it did not have power to exert under the constitution of Illinois, and its act in that respect was without law and null and void. This proposition seems to us so plain as to require no citation of authorities. But see

People *Ex Rel*, 1 California, 85; Wharton Cr. Ev., sec. 578, sec. 596.

Ex parte Sawyer, 124 U. S., page 200, opinion by Justice GRAY:

" The case cannot be distinguished in principle from " that of a judgment of the Common Bench in England " in a criminal prosecution, which was *coram non* " *judice*; or the case of a sentence passed by the Circuit " court of the United States upon a charge of an infamous " crime, without a presentment or indictment by a grand " jury. Case of the Marshalsea, 10 Rep., 68, 76; *Ex parte* " Wilsom, 114 U. S., 417 (29,89); *Ex parte* Bain, 121 " U. S. 1 (30,849).

" The Circuit court being without jurisdiction to entertain the bill in equity for an injunction, all its proceedings in the exercise of a jurisdiction which it " assumed are null and void. The restraining order, in " the nature of an injunction, it had no power to make. " The adjudication that the defendants were guilty of a " contempt in disregarding that order is equally void; " their detention by the marshal under that adjudication " is without authority of law, and they are entitled to be " discharged. *Ex parte* Rowland, 104 U. S., 604, (26, “861); *Ex parte* Fisk, 113 U. S., 713, (28, 7); *Ex* “*parte* Ayers, 123 U. S., 443, 507, (*ante*, 216–230).”

Cooley’s Constitution of Limitations, 4th ed., page 499: “Where a court by law has no jurisdiction of the sub- “ject-matter of a controversy, a party whose rights are “sought to be affected by it is at liberty to repudiate its “proceedings and refuse to be bound by them, notwith- “standing he may once have consented to its action, “either by voluntarily commencing the proceeding as “plaintiff or as defendant by appearing and pleading “to the merits or by any other formal or informal action. “This right he may avail himself of at any stage of the “case; and the maxim that requires one to move “promptly who would take advantage of an irregularity, “does not apply here, since this is not mere irregular “action, but a total want of power to act at all. Consent “is sometimes implied from failure to object; but there “can be no waiver of rights by *laches* in a case where “consent would be altogether nugatory.” We respectfully submit that upon the last contention alone the parties are entitled to be granted their prayer set forth in the assignment of errors.

In conclusion, we beg to state that if we have made this brief unusually and perhaps unnecessarily long, the excuse which we offer to this court is the serious wrong done to the plaintiff in error, and to the appellant, in and what we deem to be a gross violation of plain constitutional rights. And we respectfully submit that upon all or any of the points herein submitted that, as to the plaintiff in error, Samuel Fielden, he is entitled to have the judgment of this court reversing the judgment of the Supreme court of the State of Illinois, and an order directing his discharge; and as to the appellant, Michael Schwab, that a judgment should be entered directing the issuance of a *habeas corpus* and his discharge.

Wherefore the petitioner, Schwab, prays that a writ of *habeas corpus* may be issued, and Fielden prays that his writ of error may be sustained.

Respectfully submitted.

BENJ. F. BUTLER and
M. SALOMON,
Of Counsel for Schwab and Fielden.

Appendix "A."

The following is a list of the constitutional and statutory provisions referred to, also which pertain to the questions before the court:

I.

Amendments to the constitution of the United States, page 16, article 14, section 1: "All persons born or nat-"uralized in the United States, and subject to the juris-"diction thereof, are citizens of the United States and of "the state wherein they reside. No state shall make or "enforce any law which shall abridge the privileges or "immunities of citizens of the United States, nor shall "any state deprive any persons of life, liberty or property "without due process of law, nor deny to any person "within its jurisdiction the equal protection of the laws."

II.

Ordinance of 1787, article 2: "No man shall be de-"prived of his liberty or property but by the judgment "of his peers or the law of the land."

III.

Constitution of Illinois, article 2, section 2: "No per-"son shall be deprived of life, liberty or property with-"out due process of law."

IV.

Article 2, section 19, constitution of Illinois: "Every "person ought to find a certain remedy in the laws for all "injuries and wrongs which he may receive in his person, "property or reputation. He ought to obtain, by law, "right and justice freely, without being obliged to purchase it, completely and without denial, promptly and "without delay."

V.

Art. 6, Sec. 33: "All process shall run in the name "of the people of the State of Illinois; and all prosecutions shall be carried on in the name and by the authority of the people of the State of Illinois."

VI.

Constitution of 1870, Art. 2, Sec. 10: "No person "shall be compelled in any criminal case to give evidence "against himself, or be twice put in jeopardy for the "same offense."

VII.

Ch. 38, Rev. Stat. of Ill., Sec. 444: "In all cases "where the punishment shall be confinement in the penitentiary, if the case is tried by a jury, the jury shall say "in their verdict for what time the offender shall be confined, and the court, in pronouncing sentence, shall "designate what portion of time the offender shall be "confined to solitary imprisonment, and what portion to "hard labor."

VIII.

Crim. Code, Ch. 38, Rev. Stat. of Ill., Sec. 459: "If "the judgment is affirmed, the Supreme court shall, by "order, fix the time when the original sentence of death "shall be executed, a copy of which order shall be sufficient authority to the sheriff for the execution of the "prisoner, at the time therein specified."

IX.

Constitution of Ill., 1870, Art. 5, Sec. 13: "The Gov-
"ernor shall have power to grant reprieves, commuta-
"tions and pardons, after conviction, for all offenses, sub-
"ject to such regulations as may be provided by law,
"relative to the manner of applying therefor."

X.

Rev. Stat. of Ill., Ed. of 1889, Ch. 104 A., Sec. 1:
"Be it enacted by the people of the State of Illinois,
"represented in the General Assembly, that hereafter all
"applications for reprieves, commutations and pardons
"shall be made by petition in writing to the Governor,
"signed by the party under conviction, or other persons
"in his behalf, which petition shall contain a brief history
"of the case and the reasons why such pardon should
"be granted, and shall also be accompanied by a state-
"ment in writing made by the judge and prosecuting at-
"torney of the court in which conviction was had, stating
"the opinion of said judge and prosecuting attorney in
"regard to same, or satisfactory reasons shall be given
"to the Governor why such statements of the judge or
"prosecuting attorney, or either of them, do not accom-
"pany such petition, and it shall be the duty of such
"judge and prosecuting attorney to give such opinion
"whenever such petition shall be presented to them."

Sec. 2. "Notice of the proposed application shall
"be given by publication for three weeks prior thereto,
"in a newspaper published in the county where the con-
"viction was had, a duly certified copy of which notice
"shall accompany said petition; provided the governor

"may dispense with publication, when in his judgment "justice or humanity requires it."

XI.

Rev. Stat. of Ill., Ch. 108, Penitentiary, Sec. 1. "Be "it enacted by the people of the state of Illinois repre-"sented in the General Assembly, that the penitentiary "at Joliet, in the county of Will, until otherwise provided "by law, shall be the general penitentiary and prison of "this state, for the confinement and reformation as well "as for the punishment of all persons sentenced by any "court of competent jurisdiction in this state, for the "commission of any crime the punishment of which is "confinement in the penitentiary, in which the person so "sentenced shall be securely confined, employed at hard "labor, and governed in the manner hereinafter di-"rected."

XII.

Ch. 37, entitled Courts, Sec. 7: "The Supreme court "shall be vested with all power and authority necessary "to carry into complete execution all its judgments, de-"crees and determinations in all matters within its juris-"diction, according to the rules and principles of the "common law and of the laws of this state."

Sec. 8: "It may issue writs of mandamus, habeas cor-"pus, certiorari, error and supersedeas, and all other writs, "not prohibited by law, which may be necessary to enforce "the due administration of justice in all matters within its "jurisdiction."

Sec. 9. "Its process shall run in the name of the peo-"ple of the State of Illinois, bear test in the name of the "chief justice, be signed by the clerk of the court for the "grand division from which it is issued, dated when issued, "sealed with the seal of the court, and made returnable "according to law or such rules or orders as may be pre- "scribed by the court."

Sec. 13. "The judgments and decrees of the Su- "preme court shall be final and conclusive upon all the "parties properly before the court."

XIII.

Ch. 37 Title Courts, Sec. 61. "The several Circuit "courts in this state and the Superior court of Cook "county may make and award such judgments, decrees, "orders and injunctions, and shall issue all such writs and "process as may be necessary or proper to carry into "effect the powers granted to them."

Sec. 62. "All process of either of said courts shall "run in the name of the people of the State of Illinois, be "directed to the proper officer or person, be tested in the "name of the clerk of the court and be signed by him, "sealed with the seal of the court, or if there is no seal "of the court, then with the private seal of the clerk, "dated on the day on which it is issued, and made re- "turnable according to law or the order of the court, "when not otherwise provided."

XIV.

Ch. 37, Title Courts, Sec. 85: "The said courts and "the judges thereof shall have like powers in all matters "within the jurisdiction of said court, as the Circuit "courts in other counties may have in like matters."

Sec. 86. "Process from said courts may be in like "form, and shall be issued in the same manner, as from "Circuit courts."

XV.

Rev. Stat. of Ill., Ed. 1889, Ch. 28, Sec. 1: "Be it "enacted by the People of the State of Illinois, repre"sented in the General Assembly, that the common law "of England, so far as the same is applicable and of a "general nature, and all statutes or acts of the British "parliament made in aid of, and to supply the defects of "the common law, prior to the fourth year of James the "First, excepting the second section of the sixth chapter "of Forty-third Elizabeth, the eighth chapter of Thir"teenth Elizabeth, and ninth chapter of Thirty-seventh "Henry Eighth, and which are of a general nature and "not local to that kingdom, shall be the rule of decision, "and shall be considered as of full force until repealed "by legislative authority."

XVI.

Rev. Stat. 1889, Ch. 124, Secretary of State, Sec. 5: "It shall be the duty of the Secretary of State to keep "a fair register of all of the official acts of the governor, "and to countersign and affix the seal of state to all "commissions required by law to be issued by the "governor."

XVII.

Rev. Stat. 1889, Ch. 38, Crim. Code, Sec. 428, p. 517: "All trials for criminal offenses shall be conducted accord"ing to the course of the common law, except when this "act points out a different mode, and the rules of evi"dence of the common law shall also be binding upon all "courts and juries in criminal cases except as otherwise "provided by law."

APPENDIX "B."

The following quotations are in support of propoitions I subdivision A, that the refusal to amend the record is in denial of the equal protection of the laws:

In the case of *Wallahan* v. *The People*, 40 Ill., 102, in what are designated Practice Decisions, the Supreme court held:

"The amended record filed purports to be an additional "bill of exceptions, signed in vacation a year and a half "after the trial of the case, and without notice to the op-"posite counsel, it must be stricken from the files. If a "party desires the amendment or correction of a record "after the term at which the cause was tried, he should, "on proper notice, apply in open court, and have the "amendment appear from an order of court entered in "term time. The record, as it appears in the Circuit "court, cannot be altered except by an order of the same "court, made in term time. A bill of exceptions "* * * when properly filed becomes a part of the "record * * * and an amendment of the bill, al-"ready signed, on the filing of a supplemental bill of ex-"ceptions, is such an alteration of the record, as can be "made only on the order of the court."

In *Wallahan* v. *The People*, 40 Ill., 103, the same case again came up before the Supreme court on motion to strike the amended bill of exceptions from the files, and the court said:

"Had the party objecting to this amendment shown "to us by a bill of exceptions, that there was nothing in "the court below, or no sufficient means of information, "by which the amendment could properly be made, we "should regard this motion very differently. But as there "is nothing before us showing such a state of the case, "the presumption must be indulged that the court below "did not act without sufficient memoranda upon his "docket or on file in the cause, of what the testimony "was, and by which the amendment might be made. "Motion overruled."

In *Goodrich* v. *City of Minonk*, 62 Ill., 122, Judge BREESE delivering the opinion, the court say:

"The party taking the bill of exceptions, on discovering its imperfection, should, on proper notice, apply in "open court to have it amended. The amended record "could then be filed in this court."

Citing *Wallahan* v. *The People*, 40 Ill., 103, in support thereof.

In *Phillips* v. *The People*, 88 Ill., 161, opinion by Justice DICKEY:

"At the May term, 1875, of the Circuit court of Coles "county, Phillips was indicted for the murder of Buckland, and was furnished with a copy of the indictment, "and list of the witnesses and jurors, and arraigned in "court. When called upon to say whether he was guilty "or not guilty, he said, 'not guilty.' His attorney, who "stood by, stated to the court: 'before that plea is entered, we wish to enter a motion to quash the indictment,' and the judge entered the motion to quash the "indictment on his docket, but did not enter any statement of the plea of not guilty. But the clerk, on his "minutes, entered, that 'the defendant, for plea, said he "was not guilty, and moved to quash the indictment;' "and in making up the record for that term the clerk so "entered it upon the record. The cause was continued "without trial or any decision of the motion to quash. At "the next term of the court the accused was put upon "his trial, tried and convicted on the 16th day of December, 1875, the jury finding him guilty of murder, and "fixing his punishment at death. A motion for a new "trial was immediately made, and on the 30th day of "December, a day of the same term, the motion was "overruled. Then the prisoner interposed a motion in "arrest of judgment, and the attention of the court being "called to the fact that the accused had not pleaded, the "court ordered the judgment to be arrested. And, thereupon, attention of the court being called to the error in "the record made by the clerk in making up the record "of the May term, by which error it had been made to "appear the defendant had pleaded, on the motion of the "prosecuting attorney the court ordered the record "amended, by striking out the statement in the record "that he had plead 'not guilty.' The record being thus "amended, the court overruled the motion to quash the "indictment."

In *May* v. *The People*, 92 Ill., 346, opinion by SHELDON, Justice:

"The indictment was found at the October term, 1878, "of the Circuit court of Scott county. The trial was had "at the subsequent May term, 1879, of that court. After "the rendition of the verdict, the state's attorney moved "for an order to have the clerk enter *nunc pro tunc* the "return of the indictment into open court on the 30th day "of October, 1878, the record up to the time of the motion not showing that the indictment was ever returned "into open court, and the decisions of this court being that "it is essential that the record show this. The indictment "bore upon it the following indorsements:

"Filed October 30, 1878. 'F. M. Glasson, clerk. A "true bill. Wm. A. Gilham, foreman of the grand jury.' "Upon the oral testimony of the foreman of the grand "jury, who was introduced as a witness, of the return of "the indictment into open court, the court granted the "motion, and the record was accordingly amended so as "to show that the indictment was brought into open court "at the October term, 1878, to which the defendant ex-"cepted. This amendment of the record is assigned for "error.

"In 1 Bishop on Criminal Procedure, Sec. 1,160, "speaking of amendments after the term of the court has "closed, it is said:

"Neither, it has been held, can the clerk, at a subse-"quent term, make an entry of what truly transpired at "the preceding term. But this refers to the power of "the clerk, proceeding of his own motion. The court "may order *nunc pro tunc* entries, as they are called, made "to supply some omission in the entry of what was done "at the preceding term; yet this is a power, the extent of "which is limited, and not easily defined. In general, "mere clerical errors may be amended in this way; and "it is stated in the section following, that, in making the "amendment, the court may resort to any proof which is "satisfactory.

"In the case of *Phillips* v. *The People*, 88 Ill., 160, this "court sustained the power of the Circuit court at a sub-"sequent term, and while the prosecution was still pend-"ing, to amend *nunc pro tunc*, the record made by the "clerk at a previous term, so as to make it appear that, "at the time of a former trial, upon the same indictment "the prisoner had not entered a plea of not guilty."

In *Divine* v. *The People*, 100 Ill., 295, opinion by Justice Mulkey, the court say:

" It is a well recognized principle that judges can exer-
" cise no judicial function in vacation, except such as they
" are specially authorized to do by the statute. It is true
" the mere settling and signing of a bill of exceptions may
" not be the exercise of judicial power, yet when one is
" once signed, sealed and filed in the proper office, it be-
" comes as much a part of the record as an indictment or
" declaration when so filed, and like other portions of the
" record, it imports a verity, and no plea or averment will
" be admitted which questions the truth of what it im-
" ports. *If what purports to be a record has been so made*
" *up by the clerk or other official, as to not speak the real*
" *facts, it must be amended so as to conform to them, and*
" *this can only be done by the court whose record is sought*
" *to be amended, and must, as a general rule, be done on*
" *due notice to all such as will be affected by the amendment.*
" It would certainly be competent for the legislature to
" authorize judges to hear and determine questions of this
" character in vacation, but we are aware of no statute
" that authorizes them to do so."

Wallahan v. *The People*, 40 Ill., 102.
Goodrich v. *The City of Minonk*, 62 Ill., 121.
Newman v. *Ravenscroft*, 67 Ill., 469.

In *Dougherty* v. *The People*, 118 Ill., 160, opinion by Justice SCHOLFIELD, the court says:

" In *Wallahan* v. *The People*, 40 Ill., 104, we said ' an
" amendment of a bill of exceptions, incorporating evi-
" dence alleged to have been omitted from the original
" bill of exceptions, should not be allowed at a term sub-
" sequent to that at which a trial was had, unless there is
" something in the record to amend by.' It clearly ap-

"pears from this amended record, that there was nothing
"here, in the record, to amend by."

In *Shipley* v. *Spencer*, 40 Ill., 107. *Per Curiam*: From the affidavits and minutes of the judge below, a certified copy of which is before us, there appears to be a *fatal discrepancy between the judgment actually pronounced and that which was entered of record by the clerk. The cause will be continued to give the defendant here, who was the plaintiff below, an opportunity to apply to the Circuit court for the* correction of the entry, and a writ of *certiorari* will be awarded, that the record, when amended, may be brought here.

"The continuance is allowed upon the defendant's paying the costs of the present term; and, should he, upon his application to the court below, obtain such correction of the record as will remove the errors complained of, he will be required to pay the entire costs of the proceedings in this court. It was the duty of the plaintiff below to see to it that his judgment was correctly entered of record.

"*Certiorari* awarded and cause continued."

In *Lyon et al.* v. *Boilvin*, 7, Ill., 634, the opinion of the court was delivered by SCATES, J.

"H. L. Kinney drew a bill upon Lyon and Howard, who accepted the same. Webster, the payee, endorsed it to Boilvin, who sued the acceptors. After four summonses were returned 'not found,' the record shows that the defendants came, by Champlin, their attorney, and entered their appearance, and on their motion the cause was continued until the May term, 1842. At that term, after reciting that '*it appearing to the court that process of summons had been served,' the defendants*

" *were called, a default entered, and judgment for debt and* " *interest. At the November term, 1843, the defendants,* " *by Butterfield, their attorney, moved to set aside and va-* " *cate the judgment. On cross-motion of plaintiff below,* " *the court ordered that the entry of judgment be amended* " *so as to recite that defendants entered their appearance* " *by their attorney, instead of the recital of service of pro-* " *cess.*

"On defendants' motion, it was ordered that they have " until the 1st day of March then next to plead issuably, " and that all further proceedings on the judgment be " stayed, and which should stand as security for the plaint- " iff, and cost to abide the event.

" These several decisions were excepted to, and are as- " signed for error.

" It appears from the affidavits read in the court below, " that Champlin was not the attorneys of defendants, and " had no authority from them to appear in the case for " them in any manner.

" To the first point; the COURT UNQUESTIONABLY HAD " POWER, AND DID RIGHT IN CORRECTING CLERICAL MIS- " TAKES, AS IT WAS DOUBTLESS ONE, IN RECITING SERVICE " OF PROCESS AGAINST THE OFFICER'S RETURN. IN " AMENDING, IT WAS PROPER TO MAKE THE ENTRY RE- " CITE TRULY WHAT ALREADY APPEARED ON THE FILES, " TO WIT: AN APPEARANCE BY ATTORNEY, AND SO MAKE " IT GOOD, IN AFFIRMANCE OF THE JUDGMENT." (Rev., Stat., 48, ch. 5, §§ 2 and 3.)

Judge SKINNER, in *Coughran* v. *Gutchens*, 18 Ill., 392, says:

" But after the expiration of the term, unless the cause " is still depending, and the parties are in court, their " power over the record is confined to errors and mis-

"takes of their officers; and these may at any time, upon "notice to the parties in interest, and saving such rights "as, in the interval of time, may have accrued to third "persons, be corrected, so as to make the record conform "to the action or judgment of the court." Citing: *Stahl* v. *Webster*, 11 Ill., 511; *Atkins* v. *Hinman*, 2 Gilm., 437; *Lyon* v. *Boilvin*, 2 Gilm., 629; *O'Connor* v. *Muller*, 11 Ill., 118; *Frink* v. *King*, 3 Scam., 144; *Lampratt* v. *Whitney*, 3 Scam., 170; *Williams* v. *Waldo*, 3 Scam., 265; *Robb* v. *Bostwick*, 4 Scam., 116; *Duncan* v. *McAffee*, 3 Scam., 93; *Loomis* v. *Francis*, 17 Ill., 206; *Shirley* v. *Phillips*, 17 Ill., 471; *Chichester* v. *Conde*, 3 Cowen, 39; *Hart* v. *Reynold*, 3 Cowen, 42; *Hull* v. *Williams*, 1 Fairfield, 279 A.

In the case of *Duncan* v. *McAffee*, 3 Scam., 93, it was said:

"At this term (July term, 1841) came the defendants "in error, and moved the court to amend the record of "the judgment in this court, by the transcript from the "court below, by erasing James and inserting Isaac as the "christian name of the defendant in error, and by adding "to the judgment in the court below, the interest due on "the judgment in that court, from the time the same was "rendered to the time of the rendition of the judgment in "this court. The judgment in the court below was for "two hundred dollars debt, and six dollars and fifty cents "damages, and was so entered on affirmance in this "court, at December term, 1840. The motion was allowed, and the record accordingly amended, so that the "judgment is now entered for two hundred dollars debt "and twenty-two dollars and fifty cents damages."

In *Atkins* v. *Hinman*, 2 Gilm., 437, it was said:

"A judgment against certain lands for taxes, omitted "to state the day on which the collector returned his delinquent list to the Circuit court, and 'that the taxes "thereon remained due and unpaid on the day of the date "of the said collector's return.' At a subsequent term, "on motion and proof, the judgment was permitted to be "amended by making the proper insertions, held: that "the amendments were proper, the omissions being mere "matters of form, and evidently clerical mistakes, and "ought not to vitiate the judgment."

In *O'Conner* v. *Mullen*, 11 Ill., 57, opinion by Judge TRUMBULL, the court held:

"Circuit courts have authority to allow amendments "to their records, during the term at which a judgment is "rendered, without notice, and they may allow amendments, in matter of form, at a subsequent term, if notice, "actual or constructive, has been given to the opposite "party."

In *Stahl* v. *Webster*, 11 Ill., 515, opinion by Judge TRUMBULL, the court says:

"It is a familiar doctrine, that a court has control over "its records, to alter or amend them, during the term at "which they are entered. If, therefore, the last order of "distribution was proper, the court committed no error "in rescinding the first."

In *Newman* v. *Ravenscroft*, 67 Ill., 496, the court say:

"Where the original bill of exceptions fails to show "that the assignment of a promissory note has been read "in evidence, when it had been the only means of relief "to the party, is to move the court, when in session, to "correct the record by its insertion in the bill of exceptions."

In *Church* v. *English*, 81 Ill., 442, Chief Justice SCOTT said:

" That a court has power to amend its own records at " a subseqent term, upon notice to parties adversely in- " terested, is not doubted.

" Single inquiry is whether that authority was right- " fully exercised under all circumstances in the case. " * * * As between the original parties, we are not " aware of any limitation as to the time in which said " amendments may be allowed. No reason suggests itself, " why such amendment may not be made at any time, so long " as anything definite and certain remains to amend by, " but until the amendments are actually made third persons " can act upon nothing but the official record, kept by the " officers appointed for that purpose, and all rights pre- " viously acquired are in no manner affected by subse- " quent amendments." *Cook* v. *Wood*, 24 Ill., 295; *McCormick* v. *Wheeler*, 36 Ill., 114. " Whether the " original papers in the case were on file in the Ma- " con Circuit court, or in the Vermilion Circuit court, " when the order allowing the amendment was made is a " matter of no consequence. The validity of the order " in question is not affected by any such consideration. The " proceedings were in reference to the record previously " made, and not in regard to the papers in the case. " Nothing appears to show where the original papers " were at the time. Justice required the records should " be amended so as to show what had been done in the " cause. That power must exist somewhere. Clearly it " was not in the Macon Circuit court, for the record to be " amended, was not there. Hence, it follows, the power " was in the Circuit court of Vermillion county, and we " think it was rightfully exercised. The judgment will " be affirmed."

In *Gillett* v. *Booth*, 6 Bradw., 423, the court held:

“ Where the amendment to the record sought, is merely
“ to show some action of the court *really taken but not*
“ *recorded, it may* BE ALLOWED UPON PROPER NOTICE AND
“ DUE PROOF.

“ *A record may be impeached as well for not containing*
“ *what it ought to, as for containing what it ought not.*
“ *The question is whether, as it stands, is it inequitable*
“ *and injurious to complainant, and the result of accident*
“ *without fault or laches on his part.*”

The same case on appeal, Supreme court, 95 Ill., 183, opinion by Judge Scholfield, it is said, after quoting from *Coughran* v. *Gutchens*, 18 Ill., 390, and *Church* v. *English*, 81 Ill., 442, the court goes on to say:

“ The right to amend judgments, decrees, etc., by the
“ judge's minutes, is fully recognized. *Forquer* v. *For-*
“ *quer*, 19 Ill., 68; *McCormick* v. *Wheeler*, 36 Ill., 114;
“ *Seely* v. *Pelton*, 63 Ill., 101; *Cairo & St. L. R. R. Co.* v.
“ *Holbrook*, 72 Ill., 419. Certainly this can only be done
“ when the opposite party is before the court, or has due
“ notice, and also after saving intervening rights of third
“ parties; but no question of this kind is here involved.
“ The object of the cross-motion by plaintiff in error, was
“ not, as seems to be assumed by counsel of defendant in
“ error, to abrogate a judgment or alter a judgment, but
“ simply to place on the record a former order and de-
“ cree of the court which by reason of the negligence of
“ the clerk was never entered.

“ Upon the authorities to which we have referred,
“ there can be no question that if the judge's and clerk's
“ minutes had stood upon the respective dockets just as
“ they were originally made, without any evidence of a
“ subsequent effort to erase or cancel them, the plaintiff

" in error would have been entitled to have what his cross-" motion allowed; that is to say, he would have been enti-" tled to have had the records show precisely what had " been ordered and decreed in the case. Does the fact " that a line has been drawn with a pen across these min-" utes, afford conclusive evidence that the order or decree " evidenced by them has been revoked? We think not. " It may be conceived that it affords *prima facie* evidence " to that effect, but nothing more. If it appeared that im-" mediately after making the minutes the lines were drawn " across them by the party making them, it would leave " no room to doubt that his intention was to obliterate " them and leave his record just as if it had never been " made. But suppose these lines are drawn years after " the minutes are made, and by persons having no au-" thoritative control over the records, it is quite clear then " they would not affect the minutes and could not be con-" sidered on a question like the present.

" We are clearly of opinion that in a case of this kind " the party making minutes is a competent witness " whenever the question of the genuineness of the min-" utes is involved. Thus we think it can be proved that " what purports to be a minute of a judge or a clerk in " the given case is in fact not his minute, but is a forgery, " and upon the same principle it can be proved by him " that marks of cancelation or erasure over minutes were " not made by him. Minutes, it is true, will ordinarily be " proved by the production of the proper docket and " showing by inspection that there is a minute. And it " cannot be explained or enlarged by parol evidence. It " must speak for itself, and there is nothing about it which " precludes the possibility of forgery or mistake, and " hence it may be shown whether it is in fact what it "purports to be by evidence, *aliunde*, and it was upon "this precise ground that we refused to disturb the judgment in *Cairo & St. L. R. R. Co.* v. *Holbrook*, *supra*. "There was a minute there on the judge's docket proved "not to be in the handwriting of the judge, but in that of "the clerk, and we held, because it was shown not to "have been the minute of the judge, he was justified in "disregarding it. * * * We think the evidence was "ample to sustain the cross-motion of the plaintiff in error, "and that it was error to overrule that motion and sustain "the motion of the defendant in error. The order and "decree of the Appellate court was reversed, and the "cause remanded for further proceedings consistent with "this opinion."

In *Tucker* v. *Hamilton*, 108 Ill., 464, opinion by Judge WALKER, it was held:

"The clerk, in entering judgment by default, in action "of ejectment omitted to enter the finding of the court of "the plaintiff's title to the premises. After error assigned "in this court for this defect the plaintiff on due notice to "the defendants had the record so amended that the "judgment found that the plaintiff had a fee simple title "to the land and filed a transcript of the amended record "in this court; held: that the amendment below cured the "error."

In *Gaff* v. *Spellmeyer*, 13 Bradw., 294, it was held:

"A bill was filed to foreclose a mortgage, and process "of summons was issued thereon, and the return of the "sheriff was defective in substance as to the infant defendants in that it omitted to state the name of the white "person with whom copies were left for them and that he "was of the family. Sixteen years after the sheriff's at-

"tention having been called to the defects of his return, "he gave notice to the infant defendants of his intended "motion for leave to amend his return by inserting, etc. "The court below denied the motion upon the ground "that it had no power to allow the proposed amendment "after so long a time since the return was made; held: "that the proposed amendments should be allowed, as it "is in affirmance of the decree and in aid of the rights "acquired, and actual possession thereunder is consistent "with the return made so far as it goes, and supplies its "defects only by addition of statements, the truth of "which is not denied, and no rights of third persons have "intervened."

The same case on appeal, Supreme court, 112 Ill., 29, opinion by Judge SCHOLFIELD, who, in the course of his opinion, says:

"The appellants do not object that the evidence is insufficient to warrant the action of the Circuit court, and "there is not the slightest ground for objection in that regard.

"Gaff shows that he thoroughly recollects what he did "in making service of the writ, and gives reasons which "are entirely satisfactory why he should have such recollection. He is corroborated in all respects by the testimony of Warner, and they are both, to a considerable "extent, corroborated by othors. That the service was "in fact properly made, there can be no reasonable doubt. "The only objection urged to the correctness of the return is tihe great lapse of time—almost sixteen years— "that has intervened. This is, undoubtedly, a very important circumstance to take into consideration in passing upon such a question, but it is not necessarily controlling.

"Counsel for appellant seize upon an expiration in *O'-*
"*Connor* v. *Wilson*, 57 Ill., 226, and insist, that it holds
"such an amendment should not be allowed after the ex-
"piration of twelve years. This is a misapprehension, as
"counsel conceived; the court there expressly said: 'A
"period would not be fixed within which such an applica-
"tion should be made, and the language used with refer-
"ence to the time that had thereon elapsed was with spe-
"cial reference to the facts of that case.'

"In *Church* v. *English*, 81 Ill., 442, an amendment of
"a record, showing that an order for change of venue
"had been made, was allowed after the expiration of ten
"years, and it was said, as between the original parties,
"we are not aware of any limitation as to the time in
"which said amendment may be allowed. No reason
"suggests itself why such amendments may not be made
"at any time, so long as anything definite and certain re-
"mains to amend by."

"In *Planing-mill Co.* v. *National Bank*, 86 Ill., 590, in speaking of the language of the opinion in *O'Connor* v. *Wilson*, it was said, nor was it determined in the O'Connor case what would be a reasonable time within which to ask leave to have the amendment made, and it will not be, necessary to determine that point here. Mere lapse of time, where the rights of third parties will not be injuriously affected, as a general rule, will not bar an amendment. *Gilman* v. *Stetson*, 16 Maine, 124."

In *Dunham* v. *South Park Commisioners*, 87 Ill., 186, Judge Breese said:

"This is a writ of error to the Circuit court of Cook
"county, to bring up the records and proceedings of that
"court, had at the July term, 1877, in a case in which the
"South Park Commissions were plaintiffs, and John H.

" Dunham and others defendants, and in which there was " an amendment of the record of a prior term of that " court, and to which Dunham excepted.

" It appears that at the June term of that court held in " 1872, the South Park Commissioners had applied to " that court for a confirmation of a special assessment " made on the real estate of Dunham and others, for the " purpose of the South Park, which was granted by the " court.

" In May, 1877, Dunham sued out a writ of error, which " was made a supersedeas to reverse this judgment, " the error relied on being that the record of those pro- " ceedings showed that all five of the judges of the " Cook Circuit court sat in the proceedings and partici- " pated in the judgment and orders entered therein.

"The cause being thus pending in this court, in July " thereafter, the South Park Commissioners, then defen- " dant in the writ of error, gave notice to the attorneys of " Dunham, the plaintiff in error, that they *would make " application to the Circuit court to correct the record, so as " to conform to the truth, namely: that said term of the " Circuit court was held and presided over by Erastus S. " Williams alone, who was one of the judges of that cir- " cuit, and the proceedings had before him alone.*

" *Dunham appeared to the motion, and such proceed- " ings were had as to result in an amendment erasing the " recital of the presence of five judges, as in the original " record.* On a suggestion of diminution of the record " this court allowed a *certiorari* to the Circuit court, and " this corrected and amended record is the return thereto, " and they insist that the amendment so allowed obviates " the objection made to the original record.

" *Plaintiff in error takes a contrary view, and insists* "*the Circuit court had no power to amend the record in a*" "*material point or as to any matter of substance after the*" "*term at which the final order was made, unless there be*" "*something to amend by, in support of which he cites very*" "*many cases decided by this and other courts.* He also" "makes point that the Circuit court had no power to" "make this amendment after a writ of error had been" "made a supersedeas, and that the record, when amended," "was not within the jurisdiction of the Circuit court;" "and, further, that proper and sufficient notice of the ap-" "plication for this amendment was not given.

"We will consider these errors together. As to the" "sufficiency of the notice, it appears plaintiff in error ap-" "peared and opposed the granting of the motion, and in-" "troduced testimony on his part, no objection being then" "made to the manner or sufficiency of the notice. The" "amendment proposed had no relation to the merits of" "the action pending, or to any finding, decree or judg-" "ment of the court, *but was really and substantially a*" "*misprision of the clerk in a matter pertaining to his own*" "*duty*. It is difficult to understand why the clerks of this" "court and of the Superior court should have made up" "the placita as they did, when the slightest understanding" "of their duty would admonish them of the proper" "form; but for some inscrutable reason they made the" "record to show, in every case brought here, that the" "five judges of the Circuit court, naming them, or the" "three judges of the Superior court, naming them, were" "present at each trial. The proceeding was so absurd as" "to demand the attention of the plaintiff in error, and" "this mode of doing business was erroneous, and it was" "so held in *Jones* v. *Albee*, 70 Ill., 34; *Hall* v. *Hamilton*," "74 *ib.*, 437; *Owen* v. *Stevens*, 78 *ib.*, 462, and other "cases. Though erroneous, irregular and improper, yet "it was held it did not affect the jurisdiction in the "particular case.

"We are disposed to regard this absurd manner of "making up the record as clerical error and nothing more, "going to the formality of the proceedings, and as amendable at any time, after notice. The general rule is, un-"doubtedly, that courts, while a cause is pending, and thd "parties before them, have control over the record and "proceedings in the cause, and have jurisdiction over their "judgments and final orders of a pending term, and may, "while the cause is depending and the parties in court "amend or set them aside for cause. But after the term, "the power is confined to errors and mistakes of their "officers, and these may, at any time, upon notice to par-"ties in interest, and saving all intervening rights, be cor-"rected, so as to make the record conform to the fact. "There are numerous cases in this court to this effect.

"The Statute of Amendments and Jeofails also au-"thorizes the amendment in question." (Ch. 7, Rev. Stat. 1874, Secs. 2 and 9.) "That suing out a writ "of error, and making the same a supersedeas, is "no obstacle to the amendment, is settled by *Jones* v. "*Albee*, 70 Ill., 34; *Terry* v. *Eureka College*, *ib.*, 236, "and *Owen* v. *Stevens*, 78 *ib.*, 462, cited by appellee. A "reference to these cases will show that in all of them "the amendments were made after the causes had been "docketed in this court, and the amended records "brought here in the same way this record was brought. "We do not think the case of *Illinois Land and Loan* "*Co.* v. *McCormick et al.*, 61 Ill., 322, cited by plaintiff "in error, is hostile to these views, as, in that case, it "was sought to amend by changing the finding of the "court, making really a new and different case. Not so "here. *Here was a misprision of the clerk, and upon the "point the court had nothing to amend by, as suggested "by plaintiff in error, as it was a mere form, the judge "could amend from his own personal knowledge that he "alone sat in the cause and granted the order. It was a "matter of conscience with the judge, and of his own con"sciousness also, and an amendment like this, made under "such circumstances, is all sufficient.*

"Finding no error in this record, the judgment is af"firmed."

In *Ives* v. *Huke*, 17 Bradw., 30, the court say:-

"A final judgment cannot be amended after the term "at which it was rendered, but it may be corrected in "any matter or form where a clerical error has inter"vened, upon notice to the parties interested. Where it "clearly appears that the judgment as entered is not the "sentence which the law ought to have pronounced upon "the facts established by the record, and is not what the "court designed it should be, the court acts upon the "presumption that the error is a clerical misprision rather "than a judiclal blunder, and sets the judgment entry "right, by an amendment *nunc pro tunc*."

Appendix "C."

Cooley, Court Lim., 4th ed., p. 509, the author says:

" There is also another difference between these two "
" classes of tribunals in this—that the jurisdiction of the "
" one may be disproved under circumstances where it "
" would not be allowed in the case of the other. A rec- "
" ord is not commonly suffered to be contradicted by "
" parol evidence; but wherever a fact showing want of "
" jurisdiction in a court of general jurisdiction can be "
" proved without contradicting its recitals, it is allowa- "
" ble to do so and thus defeat its effect. See this sub- "
" ject considered at some length in *Wilcox* v. *Cassick*, "
" 2 Mich., 165; and see *Rape* v. *Heaton*, 9 Wis.,"
" 329; *Bimelar* v. *Dawson*, 4 Scam., 536; *Webster* v."
" *Reid*, 11 How., 437. * * * *But in the case of a* "
" *court of special and limited authority, it is permitted to* "
" *go still further, and to show a want of jurisdiction even* "
" *in opposition to the recitals contained in the record.*"
" *Sheldon* v. *Wright*, 5 N. Y., 497; *Dyckman* v. *Mayor*,"
" *&c., of N. Y.*, 5 N. Y. 434; *Clark* v. *Holmes*, 1 Doug."
" (Mich.), 390; *Cooper* v. *Sunderland*, 3 Iowa, 114; "
" *Sears* v. *Terry*, 26 Conn., 273; *Brown* v. *Foster*, 6 R."
" I., 564; *Fawcett* v. *Fowlis*, 1 Man. & R., 102; but see "
" *Facey* v. *Fuller*, 13 Mich., 527, where it was held that "
" the entry in the docket of a justice that the parties ap- "
" peared and proceeded to trial was conclusive. And "
" see *Selin* v. *Snyder*, 7 S. & R., 72. * * * This "
" we conceive to be the general rule, though there are "
" apparent exceptions of those cases where the jurisdic- "
" tion may be said to depend upon the existence of a cer- "
" tain state of facts, which must be passed upon by the "
" courts themselves, and in respect to which the decision "

"of the court, once rendered, if there was any evidence" "whatever on which to base it, must be held final and" "conclusive in all collateral inquiries, notwithstanding it" "may have erred in its conclusions."

In *Ex parte* Neilsen, 131, U. S., p 176, this court said: "In the case of *Re* Snow, 120 U. S., 274, (30:" "658) we held that only one indictment and con-" "viction of the crime of unlawful cohabitation, un-" "der the act of 1882, could be had for the time pre-" "ceding the finding of the indictment because the crime" "was a continuous one and was but a single crime until" "prosecuted; that a second conviction and punishment" "of the same crime for any part of said period was an" "excess of authority on the part of the District court of" "Utah; and that a habeas corpus would lie for the dis-" "charge of the defendant imprisoned on such conviction." "In that case the habeas corpus was applied for at a" "term subsequent to that at which the judgment was" "rendered; but we did not regard this circumstance as" "sufficient to prevent the prisoner from having his rem-" "edy by that writ."

"It is true that in the case of Snow we laid emphasis on" "the fact that the double conviction for the same offense" "appeared on the face of the judgment; but if it appears" "in the indictment or anywhere else in the record (of" "which the judgment is only a part) it is sufficient. In" "the present case, it appeared on the record in the plea" "of *auterfois convict*, which was admitted to be true by" "the demerrer of the government. We think that this" "was sufficient. It was laid down by this court *in re*" "Coy, 127 U. S., 731, 758 (32: 274, 280), that the power" "of Congress to pass a statute under which a prisoner is" "held in custody may be inquired unto under a writ of"

“ habeas corpus as affecting the jurisdiction of the court ”
“ which ordered his imprisonment, and the court speak- ”
“ ing by Mr. Justice MILLER, adds: ‘ And if their want of ”
“ power appears on the face of the record of his condem- ”
“ nation, whether in the indictment or elsewhere, the ”
“ court which has authority to issue the writ is bound to ”
“ release,’ ” referring to *ex parte* Siebold, 100 U. S., 371,”
“ (25, 717).”

“ In the present case, it is true, the ground for the ”
“ habeas corpus was, not the invalidity of an act of Con- ”
“ gress under which the defendant was indicted, but a ”
“ second prosecution and trial for the same offense, con- ”
“ trary to an express provision of the constitution. In ”
“ other words a constitutional immunity of the defendant ”
“ was violated by the second trial and judgment. It is ”
“ difficult to see why a conviction and punishment under ”
“ an unconstitutional law is more violative of a person's ”
“ constitutional rights, than an unconstitutional conviction ”
“ and punishment under a valid law. In the first case it, is ”
“ true, the court has no authority to take cognizance ”
“ of the case, but in the other it has not authority to ”
“ render judgment against the defendant. This was the ”
“ case in *ex parte* Lang, where the court had author- ”
ity to hear and determine the case, but we held that it had no authority to give the judgment it did. It was the same in the case of Snow. The court had authority over the case, but we held that it had no authority to give judgment against the prisoner. He was protected by a constitutional provision, securing to him a fundamental right. *It was not a case of mere error in law, but a case of denying to a person a constitutional right. And where such a case appears on the record, the party is entitled to be discharged from imprisonment.* The distinction between the

case of a mere error in law, and of one in which the judgment is void, is pointed out in *ex parte* Siebold (100 U. S., 371, 375; 25, 717, 718), and is illustrated by the case of *ex parte* Parks as compared with the cases of Lange and Snow. In the case of Parks there was an alleged misconstruction of the statute. We held that to be a mere error in law, the court having jurisdiction of the case. *In the cases of Lange and Snow there was a denial or invasion of a constitutional right. A party is entitled to a habeas corpus, not merely where the court is without jurisdiction of the cause, but where it has no constitutional authority or power to condemn the prisoner.* As said by Chief Baron GILBERT in a passage quoted in *ex parte* Parks, 93 U. S., 18, 22 (23, 787, 788): "If the commitment "be against law, as being made by one who had no jur-"isdiction of the cause, or for a matter for which by law "no man ought to be punished, the court are to dis-"charge." This was said in reference to cases which had gone to conviction and sentence. Lord Hale laid down the same doctrine in atmost the same words. (2 Hale's P. C., 144.) And why should not such a rule prevail in *favorem libertatis?* If we have seemed to hold the contrary in any case, it has been from inadvertence. The law could hardly be stated with more categorical accuracy than it is in the opening sentence of *ex parte* Wilson, 114 U. S., 417, 420, (29: 89, 90) where Mr. Justice GRAY, speaking for the court said: "It is well settled by a "series of decisions that this court, having no jurisdiction "of criminal cases by writ of error or appeal, cannot dis-"charge on *habeas corpus* a person imprisoned under the "sentence of a Circuit or District court in a criminal case "unless the sentence exceeds the jvrisdiction of that court, "*or there is no authority to hold him under the sentence.*"

This proposition it is true, relates to the power of this court to discharge on *habeas corpus* persons sentenced by the Circuit and District courts; but with regard to the power of discharging on *habeas corpus* it is generally true that, after conviction and sentence, the writ only lies, when the sentence exceeds the jurisdiction of the court *or there is no authority to hold the defendant under it.*

In the present case, the sentence given was beyond the jurisdiction of the court, because it was against an express provision of the constitution, which bounds and limits all jurisdiction.

Being of opinion, therefore, that *habeas copus* was a proper remedy for the petitioner, if the crime of adultery with which he was charged was included in the crime of unlawful cohabitation for which he was convicted and punished, that question is now to be considered."

In *Ex parte* Lange, 18 Wall., (85 U. S.,) 204, (L. P. Co., B. 21, 9, 878,) opinion of Justice MILLER, delivered 1873:

"And so it is said that the judgment first rendered in "the present case being erroneous, must be treated as no "judgment, and therefore presenting no bar to the rendi-"tion of a valid judgment. The argument is plausable, but "unsound. The power of the court over that judgmen "was just the same, whether it was void or valid. If the "court, for instance, had rendered a judgment for two "years' imprisonment, it could, no doubt, on its own mo-"tion, have vacated that judgment during the term and "rendered a judgment for one year's imprisonment; or, "if no part of the sentence had been executed, it could "have rendered a judgment for $200 fine after vacating "the first. Nor are we prepared to say that if a case "could be found where the first sentence was wholly and "absolutely void, as where a judgment was rendered "when no court was in session, and at a time when no "term was held—so void that the officer who held the "prisoner under it would be liable, or the prisoner at perfect liberty to assert his freedom by force, whether the "payment of money or imprisonment under such an order "would be a bar to another judgment on the same conviction. On this we have nothing to say, for we have "no such case before us. The judgment first rendered, "though erroneous, was not absolutely void. It was "rendered by a court which had jurisdiction of the party "and of the offense, on a valid verdict. The error of "the court in imposing the two punishments mentioned "in the statute, when it had only the alternative of one "of them, did not make the judgment wholly void. "*Miller* v. *Finkle*, 1 Parker, 374, is directly in point; but "we think that no one will contend that the first sentence "was so absolutely void that an action could be maintained "against the marshal for trespass in holding the prisoner "under it.

"The petitioner then having paid into court the fine imposed upon him of $200, and that money having passed "into the Treasury of the United States, and beyond the "legal control of the court, or of any one else but the "Congress of the United States, and having also undergone five days of the one year's imprisonment, all under "a valid judgment, can the court vacate that judgment entirely, and without reference to what has been done under it, impose another punishment on the prisoner on that "same verdict? To do so is to punish him twice for the "same offense. He is not only put in jeopardy twice, but "put to actual punishment twice for the same thing.

"The force of this proposition cannot be better illus-"trated than by what occurs in the present case if the sec-"ond judgment is carried into effect. The law authorizes "imprisonment not exceeding one year or a fine not ex-"ceeding $200. The court, through inadvertence, imposed "both punishments when it could rightfully impose but "one. After the fine was paid and passed into the treas-"ury and the petitioner had suffered five days of his one "year's imprisonment, the court changed its judgment by "sentencing him to one year's imprisonment from that "time. If this latter sentence is enforced it follows that "the prisoner in the end pays his $200 fine and is impris-"oned one year and five days, being all that the first judg-"ment imposed on him, and five days imprisonment in ad-"dition. And this is done because the first judgment was "confessedly in excess of the authority of the court.

"But it has been said that, conceding all this, the judg-"ment under which the prisoner is now held is erroneous, "but not void; and as this court cannot review that judg-"ment for error, it can discharge the prisoner only when "it is void.

"But we do not concede the major premise in this argu-"ment. A judgment may be erroneous and not void, and "it may be erroneous because it is void. The distinctions "between void and merely voidable judgments are very "nice, and they may fall under the one class or the other "as they are regarded for different purposes.

"We are of opinion that when the prisoner, as in this "case, by reason of a valid judgment, had fully suffered "one of the alternative punishments to which alone the "law subjected him, the power of the court to punish fur-"ther was gone; that the principle we have discussed then "interposed its shield, and forbade that he should be pun-

" ished again for that offense. The record of the court's " proceedings, at the moment the second sentence was rendered, showed that in that very case and for that very " offense, the prisoner had fully performed, completed and " endured, one of the alternative punishments which the " law prescribed for that offense, and had suffered five " days' imprisonment on account of the other. It thus " showed the court that its power to punish for that offense " was at an end. Unless the whole doctrine of our system " of jurisprudence, both of the constitution and the common law, for the protection of personal rights in that regard, are a nullity, the authority of the court to punish " the prisoner was gone. The power was exhausted; its " further exercise was prohibited. It was error, but it was " error because the power to render any further judgment " did not exist. It is no answer to this to say that the court " had jurisdiction of the person of the prisoner, and of the " offense under the statute. It by no means follows that " these two facts make valid, however erroneous it may be, " any judgment the court may render in such case. If a " justice of the peace, having jurisdiction to fine for a misdemeanor, and with the party charged properly before " him, should render a judgment that he be hung, it would " simply be void. Why void? Because he had no power " to render such a judgment. So, if a court of general " jurisdiction should, on an indictment for libel, render a " judgment of death or confiscation of property, it would " for the same reason be void. Or if, on an indictment for " treason, the court should render a judgment of attaint, " whereby the heirs of the criminal could not inherit his " property, which should, by the judgment of the court " be confiscated to the state, it would be void as to the " attainder, because in excess of the authority by the court, " and forbidden by the constitution.

"A case directly in point is that of *Bigelow* v. *Forrest*, 9 "Wall, 339, (76 U. S. XIX.,696.) In that case, under the "confiscation acts of Congress, certain lands of French "Forrest had been condemned and sold, and Bigelow be-"came the holder of the title conveyed by those proceed-"ings. After Forrest's death his son and heir brought suit "to recover the lands, and contended that under the joint "resolution of Congress; which declared that condemna-"tion under that act should not be held to work a for-"feiture of the real estate of the offender beyond his nat-"ural life, the title of Bigelow terminated with the death "of the elder Forrest.

"In opposition to this, it was argued that the decree of "the court confiscating the property in terms ordered all "the estate of the said Forrest to be sold, and that though "this part of the decree might be erroneous, it was not "void. Here was a case of a proceeding *in rem* where "the property was within the power of the court, and its "authority to confiscate and sell under the statute beyond "question; but the extent of that power was limited by "the statute. The analogy to the case before us seems al-"most perfect. In that case the court said: 'It is argued, "however, on behalf of the plaintiff in error that the de-"cree of confiscation of the District court of the United "States is conclusive, that the entire right, title and inter-"est of French Forrest was condemned and ordered to "be sold; and that as his interest was a fee simple that "entire fee was confiscated and sold. Doubtless, a de-"cree of a court having jurisdiction to make the decree "cannot be impeached collaterally, but under the act of "Congress the District court had no power to order a "sale which should confer upon the purchaser rights out-"lasting the life of French Forrest. Had it done so "it would have transcended its jurisdiction.' The doc-"trine of that case is re-affirmed in the case of *Day* v. "*Micou*,' (ante. 860) at the present term, where it is said "that in *Bigelow* v. *Forrest*, we also determined that noth-"ing more was within the jurisdiction or judicial power of "the District court (than the life estate) and that, conse-"quently a decree condemning the fee could have no "greater effect than to subject the life estate to sale.'

"But why could it not? Not because it wanted jurisdic-"tion of the property or of the offense, or to render a judg-"ment of confiscation, but because in the very act of ren-"dering a judgment of confiscation it condemned more than "it had authority to condemn. In other words, in a case "where it had full jurisdiction to render one kind of judg-"ment, operative upon the same property, it rendered one "which included that which it had a right to render and "something more, and this excess was held simply void. "The case before us is stronger than that, for unless our "reasoning has been entirely at fault, the court in the "present case could render no second judgment against the "prisoner. Its authority was ended. All further exercise "of it in that direction was forbidden by the common law, "by the constitution and by the dearest principles of per-"sonal rights, which both of them are supposed to main-"tain.

"There is no more sacred duty of a court than, in a "case properly before it, to maintain unimpaired those "securities for the personal rights of the individual which "have received for ages the sanction of the jurist and the "statesman. And in such cases no narrow or illiberal con-"struction should be given to the words of the fundamental "law in which they are embodied. Without straining "either the constitution of the United States or the well-

"settled principles of the common law, we have come to "the conclusion that the sentence of the Circuit court "under which the petitioner is held a prisoner was pronounced without authority, and he should, therefore, be "discharged.

"And it is so ordered."

Appendix "D."

In re Johnson Fed. Rep., vol. 46, p. 481. opinion by Judge discharging on habeas corpus:

"The last point taken on behalf of the prisoner is one "of much more serious character. By Rev. St. Sec. "5,392, the punishment prescribed for perjury is a fine of "not more than $2,000, and imprisonment at hard labor "not more than five years, with incapacity to give testi-"mony in the court of the United States. It was held by "the Supreme courts in *ex parte* Karstendick, 93 U. S., "396, that in cases where the statute makes hard labor a "part of the punishment, it is imperative upon the court "to include that in the sentence. See, also, *in re* Gra-"ham, 138 U. S., 461; 11 Sup. Ct. Rep., 363. Here "hard labor was not made part of the sentence, though "expressly required by the statute. Again, by Rev. St. "secs. 5,541, 5,542, in every case where any person con-"victed of any offense against the United States is sen-"tenced to imprisonment for a period longer than one "year, or to imprisonment and confinement at hard labor, "the court by which the sentence is passed may order "the same to be executed in any state jail or peniten-"tiary, within the district or state where such court is "held the use of which jail or penitentiary is allowed by "the legislature of the state for that purpose. Under "these sections, it was decided by the Supreme court *in re* "Mills, 135 U. S., 263; 10 Sup. Ct. Rep., 762, that "where the statute prescribing the punishment does not "expressly require that the accused should be con-"fined in a penitentiary, a sentence to the penitentiary "without hard labor for a period that does not exceed one "year is illegal. The statute of perjury does not ex-

"pressly require that the imprisonment shall be in a pen- "itentiary. The reformatory prison for women at Sher- "born is the State prison for the reformation and punish- "ment of female offenders sentenced to hard labor by the "courts of the state and of the United States, and is un- "doubtedly a state penitentiary within the meaning of "sections 5,541, 5,542; Pub. St. C. 215; Sec. 15; *id.*, C, "221, Sec. 43; St. 1887, C., 426. The sentence here was "without hard labor, and for six months only. In view "of these decisions of the Supreme court, it is impossible "to escape the conclusion that the District court exceeded "its authority in sentencing the prisoner to the reform- "atory prison for six months only, without hard labor, "and that she is entitled to be discharged from imprison- "ment under the sentence."

It was suggested at the hearing by the district attorney that, if the court should come to the conclusion that the sentence was erroneous, the prisoner might be held for a new sentence in the District court. But it was decided by the Supreme court in *ex parte* Lange, 18 Wal., 163, that an erroneous sentence, after it has been partly executed, cannot be revised by the court and a new sentence imposed, even at the same term of the court.

An order is to be entered discharging the prisoner. So in *ex parte* Mills, 135 U. S., 169, this court said, speaking by Mr. Justice :

"If the application for the writ depended upon the "question of the jurisdiction of the District court of the "United States for the Western district of Arkansas of "the offenses of which the petitioner was charged, it "would be denied. But the petition alleges that his de- "tention in the penitentiary, under the above sentences, is "contrary to the laws of United States. It is our duty "to inquire whether or not that point be well taken. If "it appears on the face of the papers that, apart from any "question as to whether the court below, or the United "States court, established in the Indian Territory by the "act of March 1, 1889, had exclusive original jurisdiction "of the offenses with which the petitioner was "charged, his detention in a penitentiary is in violation of "the laws of the United States, he is entitled to be discharged "from the custody of the warden of that institution. *Ex parte* Royall, 117 U. S., 241, 248 (29): "868, 870."

It is provided by section 5.541 of the revised statutes, that "in every case where any person convicted of any "offense against the United States is sentenced to imprisonment "for a period longer than one year, the court "by which the sentence is passed may order the same to "be executed in any state. jail or penitentiary within the "district or state where such court is held, the use of "which jail or penitentiary is allowed by the legislature "of the state for that purpose"; by section 5,546, that "all persons who have been or who may hereafter be convicted "of crime by any court of the United States, whose "punishment is imprisonment in a district or territory "where, at the time of conviction, or at any time during "the term of imprisonment, there may be no penitentiary "or jail suitable for the confinement of convicts, or available "therefor, shall be confined during the term for "which they may have been or may be sentenced, or "during the residue of said term, in some suitable jail or "penitentiary in a convenient state or territory to be "designated by the attorney general"; and by section 5,547, that "the attorney general shall contract with the

" managers or proper authorities having control of such " prisoners for the imprisonment, subsistence and proper " employment of them, and shall give the court, having " jurisdiction of such offenses, notice of the jail or peni- " tentiary where such prisoners will be confined."

Assuming that the penitentiary at Columbus, Ohio, has been designated as one in which a judgment of the court below, sentencing to imprisonment a person found guilty of an offense against the United States, may be executed, whenever the sentence is one that may be ordered to be executed in a state prison or penitentiary, we are of opinion that the sentence under which the petitioner was committed to that institution is not of that class. A sentence simply of "imprisonment," in the case of a person convicted of an offense against the United States, where the statute prescribing the punishment, does not require that the accused shall be confined in a penitentiary, cannot be executed by confinement in a penitentiary, except in cases in which the sentence is "for a longer period than " one year."

In neither of the cases against the accused was he sentenced to imprisonment for a period longer than one year. In one case the imprisonment was "for the term and " period of one year," in the other "for the term and " period of six months." There is consequently no escape from the conclusion that the judgment of the court sentencing the petitioner to imprisonment in a penitentiary, in one case for a year and in another for six months, was in violation of the statutes of the United States. The court below was without jurisdiction to pass any such sentence, and the orders directing the sentence of imprisonment to be executed in a penitentiary are void. This is not a case of mere error, but one in which the court below transcended its powers.

Ex parte Lange, 85 U. S., 18 Wall., 163, 176 (21:) 872, 878; *Ex parte* Parks, 93 U. S., 18, 23 (23:) 787, 788; *Ex parte* Virginia, 100 U. S., 339, 343 (25:) 676, 678; *Ex parte* Rowland, 104 U. S., 604, 612 (26:) 861, 864; *Re* Coy, 127 U. S., 731, 738 (32:) 274, 275; Hans Neilsen, Petitioner, 131 U. S., 176, 182 (33:) 118, 120.

Such is the effect of section 5.541, which is, in part, and without substantial change, a reproduction of the third section of the act of March 3, 1865, entitled: "An "Act Regulating Proceedings in Criminal Cases, and for "other Purposes." 13 Stat., 500, Chap. 86. That section provides: "That in every case where any person "convicted of any offense against the United States shall "be sentenced to imprisonment for a period longer than "one year, it shall be lawful for the court by which the "sentence is passed to order the same to be executed in "any state prison or penitentiary within the district or "state where such court is held, the use of which prison "or penitentiary is allowed by the legislature of such "state for such purposes; and the expenses attendant "upon the execution of such sentence shall be paid by "the United States." The words "state jail" in section 5,541, and "state prison" in the act of 1865, mean the same thing.

For the reasons stated, we are of opinion that the detention of the petitioner by the respondent, the warden of the penitentiary at Columbus, Ohio, is in violation of the laws of the United States. The rule is, therefore, made absolute.

The petitioner is entitled to the writ of habeas corpus.

APPENDIX "E."

In re Nielson, 131 U. S., 176, this court said:

" A party is entitled to a *habeas corpus*, not merely " where the court is without jurisdiction of the cause, " but where it has no constitutional authority or power to " condemn the prisoner."

See, also,

Ex parte Parks, 93 U. S., 82.

In re Snow, 120 U. S., 274, this court said:

" When a prisoner is held under the judgment of the " court, made without authority of law, the proper tri- " bunal will issue a writ of *habeas corpus* to look into the " record so far as is necessary to ascertain that fact, and " if it is found to be so, will discharge the prisoner."

In *re* Kelley, Fed. Rep., Vol. 46, page 653. Petition for habeas corpus, filed October 30, 1890, in the Circuit court of the United States for the Northern District of Oregon, the court, DEADY, J., says:

" Now, the question is whether this crime was com- " mitted when the men were put on the S. G. Reed or " transferred to the Noddleburn, or whether it was not " completed until she arrived in Clatsop county. The " respondent's contention is that the crime was not com- " pleted until the Noddleburn arrived in Astoria, and was, " therefore, committed partly in this county and partly in " Clatsop county, and is justiceable in either, under Sec. " 1,214 of the compilation of 1887, which reads:

" When a crime is committed partly in one county and " partly in another, or the acts or effects thereof consti- " tuting or requisite to the consummation of the crime

" occur in two or more counties, an action therefor may " be commenced and tried in either county.

" At common law, a crime was only triable in the county " where completely committed. A crime committed partly " in one county and partly in another was not triable in " either, and, therefore, could not be punished. But by St. " 2 & 3, Edw. VI., c. 24, Sec. 2, it was provided as fol- " lows:

" ' That where any person or persons hereafter shall be " feloniously stricken or poisoned in one county, and die " of the same stroke or poisoning in another county, that " then an indictment thereof, found by jurors of the " county where the death shall happen, etc., shall be as " good and effectual in the law as if the stroke or poison- " ing had been committed and done in the same county " where the party shall die, or where such indictment " shall be so found.'

" This statute is considered a part of the common law, " brought over to this country by the colonies, being in and " of it. It is the origin of section 1,214 of our law, which " extends the rule to all crimes.

" The crime, if any, in this case, was completed when the " petitioner induced the men, Armstrong and Kelly, to go " on board the S. G. Reed, in charge of the master of Nod- " dleburn, with the intent and expectation that they would " be thus taken or go out of the state. What followed " after that did not affect him. If he was innocent then, " he could not become guilty afterwards, and if he was " guilty then, he could not be excused or absolved by what " happened afterwards, as that the men left the ship at As- " toria, and did not go to sea. Section 11 of the bill of " rights of the constitution of the state provides:

" ' In all criminal prosecutions the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed.'

" In my judgment, the preliminary examination of a person charged with crime is within the purview of this section, as being a part or stage of such 'prosecution,' and therefore must be had in the county where the crime was committed.

" A warrant of arrest for crime must be issued by a magistrate of the county in which the same is committed or triable. Section 1,553, compilation of 1887. The warrant must be executed in the same county, unless endorsed by a magistrate out of the county. Section 1,555, *id.*

" The jurisdiction of the grand jury is also confined to crimes committed or triable in the county. Section 1,230, 1,236, 1,242, *id.* The word 'triable' is used in the statute, so that a magistrate may issue a warrant for the offender where the offense is committed, or may be tried. That, of course, is to meet the case provided for in the section, which declares that a crime committed partly in one county and partly in another may be triable in either; and that is all it is intended to meet. *The Clatsop county justice assumed jurisdiction of a crime not committed or triable in his county, and his commitment is void, not due process of law. Being an officer of the state, his act is so far that of the state, and violates the fourteenth amendment, which prohibits any state from depriving any person of life, liberty or property, without due process of law.*

" Of course if there was a question of fact in this case as to whether this crime was committed in Clatsop county or not, or of the justice having authority to examine into the matter, his determination could not be questioned in

" this proceeding in this court. If he erred, the party " would have to seek redress in the higher courts of the " state. But my conclusion is, and I have considered it " carefully, for it is a delicate and important question — " that where, as here, it appears beyond a doubt that the " crime was committed, not in Clatsop county but in " another, as this one, for instance, and the justice had no " jurisdiction to hear or determine the proceeding, where " it was usurpation from beginning to end, the commitment " cannot be considered '*due process of law.*' Beyond " question, if a crime was committed by the petitioner— " of which I say nothing—it was committed when the men " were delivered to the master on the S. G. Reed; certainly when they were delivered on the Noddleburn in " this county.

" The only pretense of inveiglement on the part of the " petitioner arises from the fact that he represented to the " men that they would get $30 per month, when it appears " that he ought to have known that they were not able-bodied seamen, and would not receive that rate of wages. " But it further appears, that the men were to sign the articles at Astoria, when they could see for themselves what " wages they were to get, and, if they were not satisfied " with the same, they might refuse to go further, as they " did.

" But it appears probable that the master did not really " intend to ship the men formally before the British vice-consul at Astoria, as he should, but was about to take " them along as and for the men who had signed the " articles and failed to report for duty.

" These had signed as able-bodied seamen, and Armstrong and Kelly, not being such, were liable to be disrated by the master on the voyage, and receive only " what he saw proper to give them.

“ In this respect they would have been inveigled out of
“ the state against their will, but by the misconduct of the
“ master, rather than the petitioner, unless he acted with
“ knowledge of the master's ulterior purpose. Against
“ this conclusion is the fact that the master told him on
“ leaving that he would ‘sign the men at Astoria.’

“ *My conclusion, therefore, is that this process, although*
“ *sufficient on its face, is, upon the facts, unfounded, not*
“ *‘due process of law,’ and the petitioner must be dis-*
“ *charged.*”

In *Re* Monroe, 46 Fed. Rept., 53, Opinion by PARKER, Judge, it is said:

“ The very first question that meets us upon the thresh-
“ old of a case where a writ is issued which may affect
“ proceedings of *the state court is, does the Federal court*
“ *have jurisdiction to issue a writ in behalf of the liberty of*
“ *a citizen who is alleged to be illegally restrained.* How
“ far may the Federal court go in its investigation of the
“ legality of the process, which, as is alleged, is in re-
“ straint of the liberty of a citizen of the state, or of the
“ United States? There seems to be a misconception in
“ the public mind as to the power of the Federal court in
“ this regard, and it is a mystery in my mind how that
“ misconception can exist in the face of the constitution
“ and laws of the United States. There is no invasion of
“ any kind, because there is no prerogative that belongs
“ to any state, nor is there any power or jurisdiction in a
“ state to deprive any citizen of liberty without due pro-
“ cess of law. The constitution of the United States, by
“ the first section of the fourteenth amendment, provides
“ that: ‘ Nor shall any state deprive any citizen of life,
“ liberty or property, without due process of law.’ When
“ a citizen is deprived of any of these rights, the power of

" the United States can be invoked in behalf of the citizen. " The constitution of the United States, by its own terms, " erects an insurmountable barrier against any state or federal authority that can be *exercised to restrain the liberty* " *of a citizen without legal warrant.* It matters not whether " *it is done under color of state authority or national authority, it is a restraint of liberty that is unwarranted, and the* " *authorities upon that subject are abundant, and some of them* " *are cases very similar to this.* That which is a part of a " state has, of course, no higher power than a state. A " municipal government is carved out of a state, and is a " part of the state machinery. Wherever there is an inhibition against a state doing a thing, the Supreme court of " the United States in many cases has held that the inhibition goes against any part of the legal machinery of the " state, as well as against the whole of it. In California, " in the case that is recognized as the Stockton Laundry " Case, 26 Fed. Rep., 611, it was decided that a party " who was held in custody for a violation of a city ordinance, which is in conflict with the fourteenth amendment " to the constitution is entitled to be discharged on habeas " corpus; and in the Laundry License Case, 22 Fed. Rep., " 701, it was held that, under the Revised statutes of the " United States, Secs. 751–755, Federal courts have jurisdiction of *habeas corpus* proceedings in the case of one " imprisoned without due process of law under an invalid " city ordinance. In a comparatively recent case decided " by Judge Gresham, (*Ex parte*, Perkins, 29 Fed. Rep., " 908) it is declared:

" 'An order or judgment of a court, acting within its " jurisdiction, punishing a party or other person for contempt of its authority, cannot be reviewed or annulled " by another court; but if a court having no jurisdiction

" over the parties or the subject-matter before it sentences " a party, a witness, or any other person to imprisonment " for contempt of its authority, the person thus illegally " deprived of his liberty may be released by any court " authorized to issue writs of *habeas corpus*.'

" The court in that case refers to a great many other " cases, but the doctrine is so well enunciated that it is " hardly necessary for me to refer to them."

U. S., 586–627, in *Ex parte* Burrus, 136 U. S., 586, opinion by Justice MILLER, this court say:

" The question of the extent of the authority of the " courts of the United States to use the writ of *habeas* " *corpus* as a means of releasing persons held in unlawful " custody, has always been clouded with more or less " doubt and uncertainty. The Constitution, by declaring " that 'the privilege of the writ of *habeas corpus* shall not " be suspended unless when, in cases of rebellion or in- " vasion, the public safety may require it,' added to the " exalted estimate in which that writ has always been " held in this country and in England. By the fourteenth " section of the act establishing the judicial courts of the " United States, it is declared 'that all the before men- " tioned courts of the United States shall have power to " issue writs of *scire facias*, *habeas corpus*, and all other " writs, not specially provided for by statute, which may " be necessary for the exercise of their respective juris- " dictions, and agreeable to the principles and usages of " law; and that either of the justices of the Supreme " court, as well as judges of the district courts, shall have " power to grant writs of *habeas corpus* for the purpose " of an inquiry into the cause of commitment; Provided: " That writs of *habeas corpus* shall in no case extend to " prisoners in jail, unless where they are in custody under

" or by color of the authority of the United States, or " are committed for trial before some court of the same, " or are necessary to be brought into court to testify.

" It will be seen in this section that, while there may " be many writs not specifically provided for in the statute which shall be within the powers of the courts of " the United States, the framers of that statute were careful to mention specifically the writ of *scire facias* and " of *habeas corpus*, and to make some special provisions " in regard to the latter. As to the power of the courts " to issue any of these writs, it was said that they must be " necessary to the exercise of the jurisdiction of the respective courts, and agreeable to the principles and " usages of law. In reference to the writ of *habeas corpus*, it is expressly enacted that either of the justices " of the Supreme court as well as judges of the District " courts, shall have power to grant the writ for the " purpose of an inquiry into the cause of commitment. " This latter clause has been interpreted occasionaly as " authorizing the issuing of the writ in any case where a " person is imprisoned or confined by an order of a court, " for the purposes of an inquiry into the cause of commitment. But the proviso, proceeding upon the idea " of the first clause, that in order to the issuing of this " writ it must be necessary for the exercise of the jurisdiction of the court which issues it, declares that the " writ 'shall in no case extend to prisoners in jail, unless where they are in custody under or by color of the " authority of the United States, or are committed for " trial before some court of the same, or are necessary to " be brought into court to testify.'

" This statute, of course, left cases of prisoners " in confinement by order of state authorities without "the benefit of this writ from the courts or "justices or judges of the United States, and the "law remained in this condition until the events con-"nected with the nullification proceedings in South "Carolina, by which officers of the United States, en-"gaged in collecting the revenue, and performing other "duties in that state, were, for that reason, subjected by "the laws of South Carolina to imprisonment. In the "recent case of *Cunningham* v. *Neagle*, 135 U. S., 1, "(34; 55), we have had occasion to review the course "of legislation by Congress on the subject of the writ of "habeas corpus, which has mainly, as now found in the "Revised Statutes of the United States, reference to "provisions for protecting the individual liberty of per-"sons, citizens of the United States and subjects or citi-"zens of foreign governments, from illegal imprisonment "under state authority. It is not necessary to go over "that field on this occasion. It is sufficient to say that "the net result of the discussion is, that all the courts of "the United States, and the justices and judges of all its "courts, are authorized to issue the writ of habeas cor-"pus in any case where a party is imprisoned or held in "custody for an act done by or under the authority of "the laws of the United States, or where his imprison-"ment is in violation of the Constitution of the United "States, or where it is supposed to be in violation of the "law of nations or of the United States, in all which "cases the Federal courts and judges have jurisdiction "to make inquiry into the matter, and in the language of "the statute, when the prisoner is brought before them, "and the matter is inquired into, the court, or justice or "judge shall 'dispose of the party as law and justice re-"quire.'

"It is not now the law, therefore, and never was, that "every person held in unlawful imprisonment has a right "to invoke the aid of the courts of the United States for "his release by the writ of *habeas corpus*. In order to "obtain the benefit of this writ and to procure its being "issued by the court, or justice, or judge, who has a right "to order its issue, it should be made to appear upon the "application for the writ, that it is founded upon some "matter which justifies the exercise of federal authority, "and which is necessary to the enforcement of rights "under the Constitution, laws or treaties of the United "States.

"It is true that perhaps the court or judge who is "asked to issue such a writ need not be very critical in "looking into the petition or application for very clear "grounds of the exercise of this jurisdiction, because, "when the prisoner is brought before the court, or jus-"tice, or judge, his power to make full inquiry into the "cause of commitment or detention will enable him to "correct any errors or defects in the petition under "which the writ issued; and it is upon such hearing to "be finally determined by the tribunal before whom the "prisoner is brought, whether his imprisonment or cus-"tody is in violation of the Constitution, or laws or treat-"ies of the United States. The cases on this subject, "as they have been decided in the courts of the country, "are not altogether in accord, but we think this is a fair "statement of the law as it stands at the present time, "under the statutes of the United States and the decis-"ions of this court.

"This subject was considered in *ex parte McCardle*, "73 U. S., 6 Wall., 218, (18: 816). In that case, al-"though the court was speaking mainly of the jurisdic-

"tion of this court by way of appeal, yet it made the "following observation with reference to the act of February 5, 1867, (14 U. S. Stat., 385), then recently "passed. The language of the statute was, that in addition to the authority already conferred on the several "courts of the United States and the justices and judges "of said court, they shall have power 'to grant writs of "*habeas corpus* in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States; "and it shall be lawful for such person so restrained of "his or her liberty to apply to either of said justices or "judges for a writ of *habeas corpus*, which application shall be in writing and verified by affidavit, and "shall set forth the facts concerning the detention of the "party applying, in whose custody he or she is detained; "and by virtue of what claim or authority, if known, "and the said justice or judge to whom such application "shall be made shall forthwith award a writ of *habeas* "*corpus*, unless it shall appear from the petition itself that "the party is not deprived of his or her liberty in contravention of the constitution of laws of the United "States.' In reference to this statute, Chief Justice "Chase, speaking for the court, said: 'This legislation "is of the most comprehensive character. It brings "within the *habeas corpus* jurisdiction of every court and "of every judge every possible case of privation of liberty contrary to the national constitution, treaties or "laws. It is impossible to widen this jurisdiction. It is "to this jurisdiction that the system of appeals is applied. "The provision of this statute is reproduced, with others "on the same subject, in section 753 of the revised "statutes.

“ In *Ex parte* Dorr, 44 U. S., 3 How., 103 (11, 514),
“ an application was made to this court for a writ of
“ habeas corpus to bring up the body of Thomas W.
“ Dorr, of Rhode Island, on whose behalf it was alleged
“ he was held under sentence of death in violation of the
“ constitution and laws of the United States. The law
“ then existing on the subject of the powers of the court
“ in awarding writs of habeas corpus was the fourteenth
“ section of the Judiciary Act of 1789, which we have
“ already recited. This court, construing that section,
“ said: The power given to the courts, in this section,
“ to issue writs of scire facias, habeas corpus, etc., as regards
“ the writ of habeas corpus, is restricted by the
“ proviso to cases where a prisoner is ‘in custody under
“ or by color of the authority of the United States, or has
“ been committed for trial before some court of the same,
“ or is necessary to be brought into the court to testify.’
“ This is so clear, from the language of the section, that
“ any illustration of it would seem to be unnecessary.
“ The words of the proviso are unambiguous. They
“ admit of but one construction, and that they qualify and
“ restrict the preceding provisions of the section is indisputable.
“ Neither this nor any other court of the
“ United States, or judges thereof, can issue a habeas
“ corpus to bring up a prisoner, who is in custody under
“ a sentence or execution of a state court, for any other
“ purpose than to be used as a witness; and it is immaterial
“ whether the imprisonment be under civil or criminal
“ process. The motion for habeas corpus was overruled.

“ It was on account of this limited power of the federal
“ courts to issue writs of habeas corpus that the various
“ statutes referred to in *Ex parte* Neagle have since been

“ passed; among the rest the one construed by this court in *Ex parte* McCardle, in which it is clear from the language of Chief Justice CHASE, that the original limitation upon the power remains, except as it is extended by the statute of 1867 and others on the same subject.

“ In the case before us there was no pretense that the child was restrained of its liberty, or that the grandfather withheld it from the possession and control of the father, under or by virtue of any authority of the United States, or that this possession of the child was in violation of the constitution or any law or treaty of the United States. The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states and not to the laws of the United States. As to the right to the control and possession of this child, as it is contested by its father and its grandfather, it is one in regard to which neither the Congress of the United States nor any authority of the United States has any special jurisdiction. Whether the one or the other is entitled to the possession does not depend upon any act of Congress, or any treaty of the United States or its constitution.”

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In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1891.

SAMUEL FIELDEN,
No. 909. v.
THE PEOPLE OF THE STATE OF ILLINOIS.

Writ of Error to the Supreme Court of the State of Illinois.

MICHAEL SCHWAB,
No. 977. v.
A. W. BERGGREN, WARDEN, ETC.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

ARGUMENT AND BRIEF FOR DEFENDANTS IN ERROR AND APPELLEES.

GEORGE HUNT,
Attorney General of the State of Illinois.
E. S. SMITH, *of Counsel.*

THE H. W. ROKKER PRINTING HOUSE, SPRINGFIELD, ILL.

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Appeal from the Circuit Court of the United States for the Northern District of Illinois.

ARGUMENT AND BRIEF FOR THE DEFENDANTS IN ERROR AND APPELLEE.

GEORGE HUNT, *Attorney General of Illinois.*

STATEMENT.

Samuel Fielden, Michael Schwab and six others were jointly indicted in the Criminal Court of Cook county, at its May term, 1886, for the crime of murder. They were jointly tried in that court and found guilty of the crime charged in the indictment. As required by statute, the jury fixed the punishment to be inflicted, and the court passed judgment in accordance therewith, sentencing Samuel Fielden, Michael Schwab and five others to suffer the death penalty, and one to imprisonment in the penitentiary for fifteen years.

The defendants jointly sued out a writ of error from the Supreme Court of the State of Illinois to the Criminal Court of Cook county, and upon hearing the case in the Supreme Court, that court, at its September term, 1887, affirmed the judgment of the Criminal Court of Cook county, and the day for the execution of the sentence fixed by the Criminal Court of Cook county having passed, the Supreme Court, in accordance with the statute, fixed the day (the 11th day of November, 1887,) for the execution of the defendants sentenced to death.

That court adjourned for the term on the 26th day of September, 1887. Application was then made to the Supreme Court of the United States by all of the defendants for a writ of error to the Supreme Court of Illinois, which was denied by this court at its October term, 1887. *Spies* v. *Illinois*, 123 U. S., 131. On November 10, 1887, the Governor of Illinois commuted the sentences of Samuel Fielden and Michael Schwab to imprisonment in the penitentiary during their natural lives.

FIELDEN CASE.

At the March term, 1888, of the Illinois Supreme, Court Samuel Fielden, Michael Schwab and Oscar Neebe, by their counsel, filed their motion therein, alleging that there is error in the entry upon the records in said cause, purporting to have been entered on the 14th day of September, A. D. 1887, and that the said entry on said record in said cause is false and untrue as to the recital, "on this day came again the said parties," etc. The motion alleged that the plaintiffs in error, nor either of them, were present, and prayed that the record may be amended so as to conform to the truth and the fact, and that it may appear upon the face of said record that at the time of the rendering of said judgment neither the plaintiffs in error, or any of them, nor their attorneys, or any or either of them, were present in court, nor were they notified to be present.

Afterwards, at the same term, the cause was stricken from the docket. Afterwards, said Samuel Fielden, Michael Schwab and Oscar W. Neebe, by their counsel, moved to set aside the order striking the cause from the docket, and further moved to amend the record so that it may appear on the record that at the time the judgment was entered, the plaintiffs in error were not present in court, and that said judgment was entered in their absence, as appears from the motion filed March 5th.

On the 26th of March, 1888, the consideration of the motion was continued to the next term of court.

Affidavits were also filed in support of the allegations of the motion. Afterwards, on the 15th day of March, 1889, the motion was denied, and on the 26th day of March, 1889, said Fielden and others filed a motion for leave to amend the original motion heretofore made, in which proposed amendment it was alleged and claimed that the said recital in said record deprived plaintiffs in error of substantial rights guaranteed by the Constitution of the United States and by the Constitution of the State of Illinois, and that the recital in the record is in violation of the Fourteenth Amendment to the Constitution of the United States, and ot Section 2 of Article 2, of the Constitution of the State of Illinois; and, again prayed that the record may be amended. On the same day plaintiff in error filed a petition for a rehearing of the original motion. On May 16th, 1889, the opinion of the court was filed over-ruling said motions for leave to file a motion to correct judgment and for a re-hearing of said motion. On the 6th day of February, 1890, said Samuel Fielden, by his attorney, filed with the Clerk of the Supreme Court his petition complaining of error in said cause "in which the final judgment was rendered against him on the 16th day of May, 1889, where your petitioner specially set up and claimed certain rights, privileges and immunities under and by virtue of the Constitution of the United States," and praying for the allowance of a writ of error, which prayer was allowed by the Chief Justice of the Supreme Court of the State of Illinois, and to review that action of the Supreme Court of the State of Illinois, this writ of error is sued out by Samuel Fielden.

ARGUMENT.

I.

No final judgment is involved in this proceeding for the review of which a writ of error will lie.

Section 709 of the Statutes of the United States authorizes this court to review on error or appeal a FINAL JUDGMENT or decree in the highest court of the State. etc.

The matter here complained of and submitted by the record produced, is not a FINAL JUDGMENT within the meaning of this statute, nor is it any judgment.

The matter here complained of is the action of the court in overruling a motion made by plaintiff in error after final judgment had been rendered.

The sustaining or overruling of the motion did not, *per se*, affect the judgment of the court, nor does the writ of error purport to affect in any direct way the final judgment of the Supreme Court in the case. Were that judgment to be reviewed it would be necessary to have before this court a transcript of the entire record in the case But only the record of the proceedings since the beginning of the March term 1888 is brought up.

It is recited in the stipulation of the attorneys for the respective parties that the question sought to be raised upon this writ of error relates to the orders of said Supreme Court at and subsequent to the March term 1888, refusing to amend the record. Printed Record, p. 30.

By the same stipulation it is set forth that the judgment in the case in the Supreme Court of Illinois was rendered at its September term, 1887, and that the court adjourned for the term on the 26th day of that month. Also in the order of Chief Justice Shope allowing the writ of error it is stated, "The record presented with this petition relates solely to the proceedings and judgment of the Supreme Court had and entered subsequent to the original judgment, and the granting of the writ here prayed can only bring up for review in the Federal Court, should its jurisdiction be sustained, the single question of the right of the petitioner to have the record of the original judgment amended at the time his application therefor was made."

And in the petition for the allowance of a writ of error the final judgment referred to to be reviewed is recited to be in the suit "in which the final judgment was rendered against him on the 16th day of May, A. D. 1889." That was the ruling of the court refusing leave "to amend the motion, denying a rehearing, and overruling the motion for leave to take exceptions and file a bill of exceptions." Printed Record, p. 23.

We submit that this ruling of May 16th is the only matter brought before the court by this record, and that it is not a "final judgment," or a judgment at all.

It is said, in Black on Judgments, Vol. 1, Sec. 1, "An action is instituted for the enforcement of a right or the redress of an injury. Hence a judgment, as the culmination of the action, declares the existence of the right, recognizes the commission of the injury or negatives the allegation of the one or the other." In the same section a judgment is defined to be "the determination or sentence of the law, pronounced by a competent judge or court, as the result of an action or proceeding instituted in such court, affirming that, upon the matters submitted for its decision, a legal duty or liability does or does not exist."

This relates to a determination of the rights, obligations or remedies of the parties, and not to the practice of the court in respect to its own rules.

A judgment is also defined to be, "the decision or sentence of the law, given by a court of justice or other competent tribunal as the *result of proceedings instituted* therein for the redress of an injury."

Bouvier's Law Dict.

"A final judgment is such as at once puts an end to the action, by determining that the plaintiff is or is not entitled to recover, and the amount in debt or damages to be recovered."

Mahoning Bank's Appeal, 32 Pa. St., 160.

The first and most obvious consequence of a judgment is that it establishes an indisputable obligation and confers upon the successful party the right to issue execution or other process of the court for its enforcement.

1 Black on Judgments, Sec. 4.

In the suit at bar, the matter submitted in the Criminal Court of Cook county was the guilt or innocence of the accused, and in the Supreme Court it was the correctness of the judgment of the Criminal Court of Cook county.

This question had been determined, and the State had had execution on the judgment. The matter submitted was determined, and final judgment was entered at the September term, 1887.

So far as this record in the Fielden case is concerned there is nothing to show any stay of execution or revision of the judgment or commutation of punishment, and it might properly be presumed, from this record, that the judgment or sentence has been fully executed.

The motions made at the March term, 1888, and subsequently decided, were interlocutory or subsidiary and their decision was not, by any means, decisive of the matters at issue between the parties. The decision on the motions was a ruling or order, and not a judgment. As said in Black on Judgments, Sec. 2—

"It is also necessary to distinguish judgments and decrees from *orders*. An order is the mandate or determination of the court upon some subsidiary or collateral matter arising in an action, not disposing of the merits, but adjudicating a preliminary point or directing some step in the proceedings. It is defined by the Supreme Court of California as a decision made during the progress of the cause, either prior or subsequent to final judgment, settling some point of practice or some question collateral to the main issue presented by the pleadings, and necessary to be disposed of before such issue can be passed upon by the court, or necessary to be determined in carrying the execution into effect.

"It will be observed that orders under the codes, thus include the judgments formerly called interlocutory. An order is granted upon an application to the court called a motion. The term seems to be practically synonymous (except for its including interlocutory judgments) with rule. But the latter is more commonly used in those States adhering to the common law practice, while order is generally employed in those which have adopted codes."

The usual style of a judgment is, "it is considered," etc., and of an order or rule, "it is ordered," etc. Ibid, Sec. 2."

Freeman on Judgments. Sec. 46.

In Illinois and in the United States courts the course of the common law is followed in practice.

The style of the final judgment in this cause—being the judgment at the September term, 1887—is, "It is considered."

Fielden Rec., p. 29.

The style of the order overruling the motion is, "The court overrule and deny said motion."

Fielden Rec., p. 23.

Freeman, in his work on Judgments, Sec. 2, says:

"A judgment, except when the signification of the word has been changed by statute, is defined as being 'The decision or sentence of the law, pronounced by a court or other competent tribunal upon the matter contained in the record,'" citing 3 Bla. Com., 395; *Ætna Ins. Co.* v. *Swift*, 12 Minn., 437.

Also,—

"The language of a judgment is not that it is decreed or resolved, but that it is considered that the plaintiff recover; or that the defendant go hence without day. The reasons announced by the court to sustain its decisions and the award of execution to produce satisfaction constitute no part of the judgment."

"The class of judgments and decrees, formerly called interlocutory, is included in the definition given in the code of the word order. Every direction of the court or judge made or entered in writing, and not included in a judgment, is an order. The Supreme Court of Californian, in one of its earliest decisions, asked the question, 'What then is the distinction between an order and a final judgment?' and answered it by saying: 'The former is a decision made during the progress of the cause either prior or subsequent to final judgment, settling some point of practice or some question collateral to the main issue, presented by the pleadings, and necessary to be disposed of before such issue can be passed upon by the court, or necessary to be determined in carrying the execution into effect."

Freeman on Judgments, Sec. 15.

In New York, an order is the decision of a motion and a judgment is the decision of a trial.

King v. *Stafford*, 5 How. Pr., 30.
Bently v. *Jones*, 4 How. Pr., 335.

"In criminal prosecutions, the same policy with respect to appeals prevail as in other cases. The judgments which may be reviewed by appeal or otherwise must be final: and, generally, no judgment will be regarded as final, unless it condemns the prisoner to be punished, and sets forth particularly the amount, duration, and place of punishment."

Freeman on Judgments, Sec. 21a.

A decision made by the court upon a matter addressed to the discretionary authority is neither a judgment nor a decree; as an application to have a cause brought forward on the docket and to vacate a certain judgment therein rendered.

Cloggett v. *Simes*, 25 N. H. 402.

Where judgment for plaintiff in an action of ejectment has been given a subsequent judgment of restitution is not a *final judgment* to which a writ of error will lie.

Lessee &c. v. *Traube's Heirs*, 9 Pet., 4.

The reasons announced form no part of the judgment.

Butt v. *Herndon*, 36 Kan., 370.

Nor does a proviso or condition of execution which relates to questions other than those submitted by the issues.

Perkins v. *Mining Co.*, 10 Nev., 407.

"The finality of a judgment on the merits, while it has especial reference to the concluding of the essential rights of the parties in respect to the subject matter in controversy, has no connection with the correctness or completion of such judgment in respect of form or incident, otherwise few judgments at law would be final. In a more general sense it has more immediate reference to the giving or refusing of the remedy sought, whether incidentally in the progress of the cause or at its termination."

Bank v. *Kerby*, 9 Ark., 352.

Where the court refused a motion to open a decree it was held that no appeal would lie from such error—though it would lie from the decree sought to be opened.

Brockett v. *Brockett*, 2 How., 240.
Wylie Adm. v. *Cox*, 14 How., 1.
Railroad Co. v. *Bradley*, 7 Wall., 575.
Brown v. *Evans*, 8 Law R., 502.

"The granting or refusing of new trials is a matter of discretion, with the exercise of which, by the court below, this court will not interfere." It is not a matter for which a writ of error lies.

Sparrow v. *Strong*, 3 Wall., 97.
Blunt's Lessee v. *Smith*, 7 Wheat., 248.
Brown v. *Clark*, 4 How., 4.
McMicken v. *Perrin*, 18 How., 507.

Nor from motions to open judgment.

Clymer v. *Thomas*, 7 S. & R., 178.

A court may not have power to alter or vacate its own judgment after term time but misprisions or mistakes of the clerk, when there is anything to amend by may be amended at any time. It is in the discretion of the court and cannot be questioned by another court, even on writ of error.

Cromwell v. *Bank*, 2 Wall. Jr., 569.

A motion for a new trial is not a suit or action and writ of error cannot be sued out thereon. The decision thereon is not a final judgment.

Magill v. *Lyman*, 6 Conn., 60

No appeal lies from an order refusing to revoke a former judgment which was itself appealable; nor from an order made after final judgment.

In re Get Young (Cal.) 27 Pac. R., 158.
Larkin v. *Larkin*, 76 Cal., 323.
R. R. Co. v. *McGrath*, 74 Cal., 49.
Tripp v. *R. R. Co.*, 69 Cal., 631.
Kubli v. *Hawkett* (Cal.) 27 Pac. R. 57.

A final judgment is that which disposes of the suit, finally determining the rights of the parties on the issues presented.

The final judgment in this case was entered at the September term 1887, and there could not be a *subseqent final judgment* in the same suit. There might be other steps, motions, executions, etc., to affect or enforce the final judgment entered but there cannot be another final judgment. The matter subject for review here is simply the ruling of the court on a motion relating to the final judgment.

The final judgment in the case was the judgment entered at the term ending September 26, 1887. The motion to amend was made at the March term 1888, after the judgment of the September term had been executed, except where modified by pardon. The motion to amend the record was continued to the Septemmber term 1888, and then to the March term 1889, and then on March 15, 1889, was overruled.

Then on the 26th day of March, 1889, was made a motion for leave to amend the motion, a motion for re-hearing and a motion for leave to take exceptions and file a bill of exceptions. These motions were continued and on May 16, 1889, were each overruled. (Rec. 23). The action of the court in overruling these motions is the matter complained of and to review which a writ of error is asked by the petition presented to the chief justice of the Illinois Supreme Court. (See Rec. p. 23). It is stated in the petition that this is the final judgment. All the matters, however, taking place subsequent to the beginning of the March term 1888, have been considered in argument.

The overruling of the motions on May 16, 1889, was no more a final judgment that the overruling of the motion for leave to amend the record. Neither was a judgment. Each was only a ruling on a motion and no ruling on either of the motions would determine or declare any right, obligation or remedy of the respective parties with respect to each other upon any issue presented to the court, which is the province of a judgement.

The allowance of the motions made would not declare any rights of either party or directly have any effect upon them. They were only collateral or subsidiary to the object desired. It is not so with a judgment. It determines the rights of the parties. No further action of the court is required to give execution and afford the remedy or relief desired. In the decision of this motion is nothing determinate. It is, therefore, not a final judgment upon which a writ of error will lie.

We believe no case can be found where writ of error or appeal has been entertained to review the action of a court in refusing to interfere with a judgment entered at a term prior to that at which the motion was made, and where appeals and writs of error are allowed only to review a final judgment.

II.

The record in this proceeding presents no federal question.

In order that this court shall have jurisdiction to hear this writ of error there must be presented to the court by the record a case wherein is claimed a right, privilege, or immunity under the constitution, a treaty or statute of the United States and the decision of the lower court must have been against such right, privilege or immunity.

In the original case of *Spies et al* v. *The People of the State of Illinois*, out of which this case arises, 122 Ill., 1, 123 U. S., 131, no federal question was either raised or decided in the State court. Had such question been raised it would have been decided on error from this court. It was then decided there was no federal question in the record.

Can a federal question be raised by motion after judgment in such manner as to give this court jurisdiction when none existed before? It seems to us clearly not. But this is the force that will be given to the motion if jurisdiction is given to this court at all. We urge that after final judgment in which no federal question is involved and after the case is stricken from the docket, the State court cannot be required to maintain a motion for the purpose of raising a federal question, nor would its denial of a motion at such time insert into the record a federal question not before included therein. And especially such question could not be injected into the record by a motion for leave to amend a motion which had already been considered and denied by the court, as in the case at bar.

The motion first entered on behalf of plaintiff in error, and decided by the court, made no reference whatever to any rights or privileges claimed under the Constitution or laws of the United States. After the motion had been decided, plaintiff in error sought to amend his motion so as to have it include a claim of a right under the Fourteenth amendment to the Constitution of the United States. Rec., page 15.

This writ of error is not to ask this court to declare to be erroneous or void a judgment of the Illinois court imposing punishment upon, or requiring anything to be done by, or withholding anything from plaintiff in error. It simply asks this court to declare erroneous the action of the Illinois court in refusing to change a recital of its own preliminary to a judgment affecting petitioner. Although plaintiff in error claims changing the recital would furnish a basis for changing the judgment of the Illinois court, or procuring its reversal in a higher court, it cannot be contended that changing or striking out the recital complained of would of itself affect the judgment against him. There would remain the judgment of the Supreme Court, that in the judgment of the Criminal Court of Cook county there is no error,—which is the judgment plaintiff in error wishes to lay the foundation for reversing.

If a right or claim under the Constitution of the United States is denied to a litigant in a state court in such manner as to give jurisdiction to this court on error, that right must be denied in the judgment,—either specifically or necessarily.

The Constitution of the United States makes no requirements of the State courts as to what their records shall recite, or that they shall amend their records upon demand of a litigant. If the judgment itself is not erroneous, the

United States court will not concern itself as to any recitals not affecting the judgment.

The most that could be claimed by plaintiff in error from a decision on the motion in his favor is, that it would be a step towards helping him to bring to this court for review and reverse the final judgment in the suit in the Supreme Court of Illinois, that is, the judgment entered at the September term, 1887.

A writ of error to review the judgment of the highest tribunal of a State cannot be maintained in the absence of a Federal question giving this court jurisdiction.

Davis v. *Texas*, 139 U. S., 651.

A title, right, privilege or immunity under the Constitution, or any treaty or statute of the United States, is not properly set up or claimed, under Rev. Stat., Sec. 709, where suggested for the first time in a petition for rehearing, after judgment.

Texas & Pac. Ry. v. *Southern Pac. Co.*, 137 U. S., 48.
Caldwell v. *Texas*, 137 U. S., 692.

The motion in this case is, in effect, a motion for rehearing, if of any effect.

To give this court jurisdiction of a writ of error to a State court it must appear affirmatively, not only that a federal question was presented for decision by the highest court of the State having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment, as rendered, could not have been rendered without deciding it.

DeSaussure v. *Gaillard*, 127 U. S., 216,
Johnson v. *Risk*, 137 U. S., 300.
Cook Co. v. *Cal. & Chi. Canal Co.*, 138 U. S., 635.

To give this court jurisdiction to review the judgment of a State court under Section 709, R. S., because of the denial by the State court of any right, title, privilege or immunity claimed under the constitution, or any treaty or statute of the United States, it must appear on the record that such right, title, privilege or immunity was specially set up or claimed at the proper time and in the proper way.

Leeper v. *Tex.* 139 U. S., 462.

In determining the ground upon which the judgment of a State court was rendered, this court may refer to the opinion of that court.

W. A. Wood Machine Co. v. *Skinner*, 139 U. S. 293.

III.

POWER OF AMENDMENT.

Where the question before the Appellate Court relates to the power of an inferior court to do something which the record shows it has done, or refused to do, the Appellate Court will in a proper case review the action of the lower court and decide the question of *power*. Where, however, the action of the lower court involves the exercise of a *discretionary power*, such action will not be reviewed by the Appellate Court, and the inferior court be coerced to exercise its discretion in a manner consistent with the judgment of the Appellate tribunal. Such action would at once destroy all elements of discretion,

In the case at bar, the refusal of the Supreme Court of Illinois to make the amendment is not distinctively placed on either ground. On this point, the learned justice who wrote the opinion of the court (printed record p. 20) says:

> "Under our practice, amendments of the record in affirmance of the judgment, when there is anything to amend by, may upon notice, be made at a term subsequent to that at which final judgment is rendered; but amendments not in affirmance but in derogation of the judgment are not allowed at a term subsequent to that at which final judgment is rendered. *Planing Mill Co.* vs. *Merchant's National Bank*, 97 Ill. 294; see also, Powell on Appellate proceedings, appendix, p. 387, note 1. The amendment in *Phillips* vs. *The People*, 88 Ill. 161, was made before final judgment, and that in *May* vs. *The People*, 92 Ill. 346, was also made before final judgment, and it was, moreover, in affirmance of the judgment.
>
> This motion, not having been made at the same term at which final judgment was rendered, nor until the case had passed beyond the power of this court to stay by its order the execution of the judgment, clearly comes too late."

An examination of the three cases cited in the opinion from the Illinois reports, will show that they fully sustain the position taken by the court. In case of *Phillips* vs. *The People*, 88 Ill. 161, the amendment was made in the trial court, and consisted of striking out a plea of "not guilty" erroneously entered by the clerk, and this amendment was made during trial and before any judgment had been entered.

In case *May* vs. *The People*, 92 Ill. 346, the indictment was found at the October term, 1878, of the Circuit Court, was endorsed "a true bill" signed by the foreman and marked "filed" by the clerk, but did not show that it had been returned into open court. Trial was held at the May term, 1879, and before judgment the record was amended by the clerk entering therein *nunc pro tunc*, the return of the indictment into open court. In that case the court quotes approvingly, 1 Bishop on Criminal Proc. Sec. 1160, showing that the amendment was sanctioned as an exercise of inherent or common law power by the court, and not in pursuance of any statutory provision relating to amendments. The amendment simply consisted of making the record show something that had actually transpired in the progress of the case, which the clerk, by inadvertence, had failed to properly enter, as he should have done.

In the other case, *Chicago Planing Mill* vs. *The Merchant's National Bank*, 97 Ill. 294, the amendment was permitted by the trial court after the close of the term at which the judgment was rendered, and consisted of amendment to the sheriff's return, which amendment showed that no service was had upon the defendant, and the effect of which was to destroy the judgment. The power of the trial court in such matters is fully considered, and the Supreme Court deciding that no authority for allowing such amendment is conferred by statute upon the trial court say: "A statute allowing such amendments would, in our opinion, be a most dangerous one to the stability of judgments, and we shall not assume that the legislature intended so to enact, in the absence of phraseology admitting of another reasonable construction." The court further say: "Under the English statutes and decisions thereon, no amendment was admissible save in affirmance of judgment." And in support thereof cite Blackmoer's case, 4 Coke R. part 8, p. 452, side page 156 a; 1 Tidd's Practice, (4 Am. Ed. 696): Wooden & Hazel's case, 1 Leonard, 134; *Thompson* v. *Crocker*, 1 Salkeld, 49; *Walker* v. *Slackoe*, 5 Modern, 69. showing also that this had been the holding of the courts of all the states of the union, where the question had been directly presented for adjudication, and in support thereof, citing the following cases from the various state reports:

Stewart v. *Springer*, 45 Mo. 113; *Kitchen* v. *Reinsky*, 42 id. 427; *McClure* v. *Wells*, 46 id. 311; *Grower* v. *Smith*, 49 id. 318; *White River Bank* v. *Downer*, 29 Vt. 332; *Davis* v. *Putnam*, 5 Gray, 321; *Hopkins* v. *Busch*, 3 Ga. 222; *Moyer* v. *Cook*, 12 Wis. 335; *Newhall* v. *Provost*, 6 Cal. 85; *Powell* v. *Commonwealth*, 11 Grat. 822; *Dorsey* v. *Pierce*, 5 Howard (Miss.) 173; *Hughes* v. *Lapice*, 5 Smedes & Mar. 541; *English* v. *Furness*, 3 Ab. Pr. Rep. 82; *Gasper* v. *Adams*, 24 Barb. 287.

Provision is made in the statutes of Illinois for amendments during the progress of a cause in civil, but none in criminal; cases. The powers exercised by trial courts in such matters are therefore such as are regarded as the inherent powers of common law courts. As the statute contains no provisions relating to the powers, or controlling the proceedings of the Supreme Court in these particulars, its powers, of the extent of which, being a court of last resort, it must be the judge, are those of common law courts.

The Supreme Court is the creature of the State, taking its origin in the constitution and deriving its powers from that instrument and the laws made in pursuance thereof. It is well settled that in construing the statute of a State, this court will follow and adopt the construction given to such statute by the highest court of the State. If it is urged that a State court is clothed with a power, or burdened by a duty, by virtue of a statute of the State, then the construction placed upon the statute by the highest court of the State, must settle the question of the existence of such power or duty. Such determination, we insist is binding and conclusive on this, as well as on all other courts.

Of the manner in which its proceedings shall be conducted, of its rules of practice, of the manner in which records are kept and its control over them, such court must be the ultimate judge.

For this court to decide that the highest court of a State possesses powers which that court denies to itself would be an anomaly. This court is not the judge of the ultimate power of the Supreme Court of a State, as derived from the State. It may review the decision of such court, where that decision involves a federal question, so raised as to make it properly reviewable here, but we insist that it will in no instance compel such court to amend its record for the purpose of presenting a federal question.

What has been said regarding the supervisory jurisdiction of this court, over the statutory powers and duties of State courts, is alike applicable where the powers and duties of such courts are alleged to exist by virtue of the common law. And it is well settled that the common law provisions of the constitution of the United States, have reference alone to procedure in the federal courts. That they have no relation to and in no particular control proceedings in the State courts. There is no common law pertaining alike to the United States and the several States. Nor has the national judiciary authority to enforce the common law in a State, as a local police power, or as the law of the land.

It is a fact of which this court is well informed that in many of the States, the common law, as such, is not in force at all, and in others, among them Illinois, it is in force to a limited extent, and there by statutory adoption. No more, therefore, will this court interfere to compel a State court to exercise a common law power which that court denies that it possesses, than it will to compel the exercise of an alleged statutory power the existence of which is alike denied. The Supreme Court of the State of Illinois must be the ultimate judge of what its common law powers are, and its determination of that matter can nowhere be reviewed. To assert an appellate jurisdiction over such determination, would involve a federal question in practically every common law adjudication in the highest court of any and every State. To attempt to enforce the common law in a State whose highest court has decided that such law is not in force there, is to enforce a law that does not exist, and to try a man by such law, is not to try him by the law of the land.

This court will not compel the highest court of a State to exercise a common law power which that court denies that it possesses, where the sole purpose of the exercise of such power is to raise a federal question. And yet it seems that this writ of error is prosecuted to accomplish that end.

Whether, therefore, the power to correct the record as demanded in this case, is alleged to exist by virtue of a statute, or of the common law, we insist that the ultimate determination of the existence of the power is with the Supreme Court of the State.

In case of Wight, petitioner, 134 U. S., 136, the power of the court to amend its record after the expiration of the term at which the record was made is discussed at some length. Justice Miller, who delivered the opinion of the court in that case, quotes approvingly the rule as laid down in Bishop's Criminal Procedure, Sec. 1169, viz.:

> "When the term of court has closed, it is too late to undo at a subsequent term, what was done at a former term. A judgment of the court, for instance, can not then be opened. and modified or set aside. Neither, it has been held, can the clerk, at a subsequent term, make an entry of what truly transpired at the preceding term. But this refers to the power of the clerk proceeding on his own motion.
>
> The court may order *nunc pro tunc* entries, as they are called, made to supply some omission in the entry of what was done at a preceding term; yet this is a power, the extent of which is limited, and not easily defined. In general,

mere clerical errors may be amended in this way. So of the mistake of the clerk in the name of the judge before whom the indictment was found."

On the ground that "the case comes within the clause of this section which declares the power of the court to make *nunc pro tunc* entries to supply some omission in the record of what was done at the time of the proceedings," thi court upheld the power of amendment which had been exercised by the court below, consisting of a *nunc pro tunc* order of the Circuit Court remanding the case to the District Court.

In case *Galloway* v. *McKeithen*, 5 Iredell, 12, it was only decided that "the county court of Brunswick, at the December session, 1842, had a right to amend any omission in the record of the same court, which had taken place at the June term, 1837, by the act of the clerk or court.

"And when the record was thus amended, it stood as if it had never been defective, or as if all the entries had been made and completed at the June session of 1837."

This amendment was in support of the judgment, and consisted only of an entry in the record of what had actually taken place, but had been omitted from the record by the act of the clerk.

The case of *Hyde* vs. *Curling & Robertson*, 10 Missouri, 359, erroneously cited as *Hyde* vs. *Curling*, 10 Missouri, 374, holds that—

"No question can exist as to the power of the court to make *nunc pro tunc* entries, for the furtherance of justice, and thus to place on the records the action of the court had on a former day of the term, or at a previous term, and which the clerk had omitted to enter at the time.

"But where the court omits to do that which, by the rules of law and the practice of the court, it may legally do, it can not supply such omission at a subsequent term, by an entry *nunc pro tunc*. And wherever it becomes necessary to make such an entry, the record should show the fact upon which the power is exercised."

The amendment, in this case, consisted of an entry showing that at a former term a judgment by default had been ordered, before final judgment, and was, therefore, manifestly in support of the judgment, yet the Supreme Court refused to sanction the exercise of the power, for the reason that there was in the record, "an absence of any evidence conducing to show that the judgment by default had actually been ordered, when the plaintiff was by law entitled to it, and that the subsequent order or judgment was made to supply the omission of the clerk, and not that of the court," and for error in so making the amendment the judgment was reversed.

In case, *State* vs. *Clark*, 18 Missouri, 432, the clerk of the Circuit Court had omitted to mark on the indictment the time of filing the same. A motion was made to discharge defendant from his recognizance, "because there is no indictment in this cause filed in the clerk's office in this court by indorsement of the clerk on said indictment."

After the entry of the motion, which was at a term of the court subsequent to that at which the indictment had been returned, the record was amended by a formal entry, showing the return of a venire facias for a grand jury by the sheriff, the swearing and impanneling the grand jury, of which Ransom S. Matthews was, by the court, made foreman, and that the same were charged by the court, and retired to consider of their indictments; and on Tuesday, the second day of the term, the following proceedings were had: "The grand jury returned into court the following true bills of indictment." Then followed a copy of the indictment in the Clark case. The court sustained defendant's motion and discharged him, from which judgment the Circuit Attorney prosecuted an appeal.

The Supreme Court sustained the right of amendment, remarking:

"We see that he had been recognized to appear at court at the April term, 1853, to answer to the State upon an indictment for gaming. We see that the clerk had omitted to make or indorse upon the indictment the day the same was returned by the grand jury into court; and we also suppose, from what we can make out of the record sent up to this court, that the clerk had omitted to make the proper entries in the records of the meeting of the court at the September regular term, and had omitted to enter the swearing and charging the grand jury, and the return by that body into court on the second day, the bills of indictment found by them.

"This omission of duty by the clerk was supplied by the Circuit Attorney making the entry for him. There is no error in thus making up the records of the court in proper form from the minutes kept of the proceedings of the court by the clerk.

"The court could see and know from the minutes, whether there had been a regular term of the court at September, in the year 1852; whether a grand jury had been sworn, impannelled and charged, and could also ascertain if there were any indictments found by the grand jury, and returned into court by them, and were there with the records of the court before it.

"If these acts had taken place, the failure of the clerk to make proper and formal entries on the records of the court, might have been supplied or corrected, by having such entries made *nunc pro tunc.*"

In this case, it will be seen, the Supreme Court assumes and concludes that there were in existense, available by the court, some minutes or memorandum of the clerk, by which the amendments could be made. The minutes were sufficient evidence that the facts indicated by them had transpired, and the record was defective only by reason of the neglect of the clerk to make the record show the facts.

Moreover, the amendments were made before judgment, and while the court still had jurisdiction of the subject matter and the parties.

The case of *Bilansky* v. *Minnesota*, 3 Minn., 427, is commented on at length by the learned justice who delivered the opinion in the Wight case.

After trial and verdict, the case was taken to the Supreme Court, where the judgment was affirmed and the case remanded to the district court for sentence upon the verdict.

A motion was then made by defendant in arrest of judgment for the following reason apparent on the face of the record:

"1. That no officer was sworn to take charge of the jury when they retired to make up their verdict.

"2. That all the jurors were not sworn as prescribed by law.

"3. That after the verdict was rendered, it was not read to the jury and they asked if it was their verdict."

Other reasons were assigned, but those above given include all which are pertinent to this discussion.

The prosecuting attorney, finding that the record did not present a full and true history of the case, moved the court, at the time motion in arrest was made, to amend the record by making it show:

"1. That each juror was sworn as prescribed by law.

"2. That when the jury retired they were put in charge of an officer who was duly sworn to keep them as prescribed by law.

"3. That upon each adjournment of the trial, and before the charge of the court, the jury were permitted to separate with the consent of the defendant.

"4. That the jury were polled at the request of the defendant on the coming in of the verdict, and each assented to it. That it was then entered and read over to the jury, and by them again assented to."

The truth of none of the matters set up in the amendments was controverted. Let it be borne in mind, also, that these amendments were made before final judgment in the case, and that each and all of them were to supply clerical omissions in making up the record, and that all were in support of the judgment which it then became the duty of the court to pronounce.

And, upon this point, the Supreme Court quote approvingly, in supporting the right of amendment, the words of Blackstone:

"That now all proceedings are considered as *in fieri* until judgment is given, and, that till then, they have power to admit amendments by the common law."

The decision in *Nelson* v. *Barker*, 3 McLean, 379, related to the right of a party to a suit to amend a declaration in a civil suit, after a plea of misnomer had been filed. It was held that the amendment was allowable under the act of Congress, relating to United States Courts.

It will be seen that in no one of the foregoing cases cited by this court in the Wight case, was raised the right, after the expiration of the term, to amend the record in a manner or particular derogatory to the judgment, nor is there an intimation in any one of them that such a right exists or that such a practice would be sustained.

It was not within the power of the Illinois Court to make the amendment at the time the motion in the case at bar was made.

The final judgment—the judgment which fixed and determined the rights of the parties with respect to each other upon the issues presented in the suit—was entered at the September term, 1887, and, as before stated, was fully executed except where stayed by the exercise of the pardoning power. The court adjourned for that term on September 26, 1887. No motion was made to amend until at the March term, 1888. The court had then lost all control over its judgment of the preceding term.

Without conceding that an allowance of the motion would in any way affect the validity of the judgment, the purpose of the motion was to modify that judgment—to destroy its validity or force. In other words, if the effect of an allowance of the motion would be such as contended for by the plaintiff in error, it was not different in purpose or character from a motion to set aside the judgment of September 14th, 1887. Of course if its allowance would have no effect the plaintiff in error is not injured by its refusal.

It is the policy of the law, a judgment shall have the element of definiteness and stability. It can be modified or amended only in accordance with the law and rules of court. After the judgment is once entered and becomes matter of record and the court has adjourned, that judgment is not to be subject to the fickleness or whims of the judge who rendered it—nor is he to again pass upon it on subsequent evidence produced by either party. That judgment is final so far as that court is concerned. It may be reviewed upon writ of error or appeal but not on motion to set it aside or to open it for further consideration, or for the purpose of entering a different judgment—which is the purpose of the motion in the case at bar.

This is the construction of the law by the Supreme court of Illinois as to its powers; see the opinion of Justice Scholfield Rec, 20, and is the construction of the law by the federal courts.

Circuit courts of the United States have no authority to set aside decrees or judgments after the term at which they are rendered.

Cameron v. *McRoberts*, 3 Wheat, 591.

Nor to set aside, modify or correct them.

Bronson v. *Schulten*, 104 U. S., 410.

In the latter case this court said:

"It is a general rule of the law that all the judgments, decrees or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and they may then be set aside vacated, modified or annulled by that court.

But it is a rule equally well established, that after the term has ended, all final judgments and decrees of the court passed beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify or correct them, and if errors exist they can only be corrected by such proceeding by a writ of error or appeal as may be allowed in a court which by law, can review the decision. So strongly has this principle been upheld by this court, that while realizing that there is no court that can review its decisions, it has invariably refused all applications for rehearing made after the adjournment of the court for the term at which the judgment was rendered. And this is placed upon the ground that the case has passed beyond the control of the court. *Brooks* v. *Railroad Co.*, 102 U. S. 107; *Public Schools* v. *Walker*, 9 Wall. 603; *Brown* v. *Aspden*, 14 How., 25; *Cameron* v. *McRoberts*, 3 Wheat. 591; *Siebold* v. *United States* 12 Pet., 483; *United States* v. *The Brig Glamorgan*, 2 Curt. C. C., 236; *Bradford* v. *Patterson*, 1 A. K. Marsh (Ky.) 464; *Ballard* v. *Davis* 3 J. J. Marsh (Ky.) 656."

As the Supreme court of Illinois decided it had no power to alter its judgment after the term at which it was rendered—no motion or other steps having been taken at that time for that purpose—and this court has decided the same way as to its own powers, it seems there should be no controversy as to how this court will hold as to the powers of the Illinois court.

If, on the other hand, the power to make the amendment asked is a discretionary one, then it is well settled that its existence in any given way will not be coerced. The determination of the State court as to what it will do is final and will not be reviewed. Certainly it will not be reviewed to the extent of substituting the discretion of this court for that o. the court in which the discretion is lodged, when the sole purpose of such substitution is to raise a federal question.

On this subject Powell, in his work on Appellate proceedings, page 398, says:

> "The Supreme Court of the United States has repeatedly decided that amendments and the like matters are subjects of discretion, and cannot be reviewed on error, but especially was this held by Judge Livingston, where he said that amendments, new trials, questions of practice and the like are matters of discretion, which can not be assigned for error. But the most decided authority against it is that of *Mellish* v. *Richardson*, in the House of Lords, in which Tindal, Ch. J., reports to the House of Lords that such orders are strictly and properly matters of practice in the progress of the case, regulated by the powers of amendment which the courts possess, either by the common law or by the statutes of amendments.
>
> "The practice of the courts below is a matter which belongs to the exclusive discretion of the court itself, it being presumed that such practice will be controlled by a sound legal discretion. It is therefore left to their own judgment alone without any appeal to or revision by a superior court. In reference to this case, Lord Drennan afterward said: 'After the case of *Mellish* v. *Richardson* I think we ought not to hear the question argued. We must now admit that the two highest tribunals in the world, the House of Lords and the Supreme court of the United States, have fully settled by their opinion that the decision of the question of amendment and similar discretionary matters by the court below, cannot be reviewed in error by the Appellate court, upon the ground that such questions are purely matters of discretion.'

"The discretionary control of the court over its own orders and judgments, during the term at which they are entered, ends with the term; and the power of the court to set aside or vacate its judgments subsequent to the judgment term is governed by settled principles, to which the action of the court must conform, and for a departure from which a judgment or order of the court may be subject to reversal on proceedings in error."

Powell on Appellate Proceedings, p. 382, Sec. 11.

"Wherever the practice has been in accordance with the principles of the common law, the judgment itself, when finally entered up, especially after the term, or after anything had been done towards its execution, was looked upon as an inviolable and unalterable matter, the ultimate object of the determination of the litigation and its record, which was not to be altered, amended or tampered with, except by due process of law, in error or review.

"This is still the doctrine as to the judgment itself, notwithstanding the present liberal terms upon which amendments are allowed, 'which are in futherance of justice.' Although the judgment itself is thus protected from all amendments or alterations which in the least change any principle or substantial matter affecting the rights of the parties, yet amendments may be made in the record, which may in a formal matter affect the judgment, but which are necessary and proper in conforming it with the action, pleadings or verdict, and the evident intentions of the proceedings, so that it is in 'furtherance of justice.' Thus, the judgment may be amended so as to correspond with the real cause of action which was tried, or the true names of the parties; or the pleadings may be amended so as to harmonize with the verdict and judgment, or the verdict amended in a formal matter, so that it accords with the case which was tried, and the evident intention of the jury and the truth of the matter, so that it may harmonize with the pleadings and judgment. But the principle or substantial matter of the judgment or verdict cannot be altered or touched."

Id. 387, 388, appendix.

"There never has been a day, under the common law, when the judge attempted to amend the record by altering the judgment in a case, at a term subsequent to the one in which the final judgment was rendered, but what it would have been reversed on error, on the account of the want of power to do so; for it had become an established rule and principle that the final judgment should not be altered by an amendment which changed the decision at a subsequent term."

Id. 197, Sec. 119.

"The question of amendment was a question of discretion in the court below upon its own review of the facts in evidence; and we know of no right or authority in this court upon a writ of error to examine such a question or the conclusion to which the court below arrived upon a review of the facts, which seem to us to have belonged appropriately and exclusively to that court."

Math.'s Admr. v. *Grant's Admr.*, 2 How., 279.

Ins. Co. v. *Hodgson*, 6 Cranch, 206.

A motion to reinstate a cause is one for the discretion of the court, and its refusal is not a ground for a writ of error.

Welch v. *Mandeville*, 7 Cranch, 152.

Walden v. *Craig*, 9 Wheat., 576.

"It has been decided in this court that the allowance or disallowance of amendments is not a matter for which a writ of error lies here."

Chirae et al. v. *Rineker*, 11 Wheat., 280.

"This court will not exercise any control over the proceedings of an inferior court of the United States in allowing or refusing to allow amendments in the pleadings, in cases depending in those courts."

Ex parte Bradstreet, 7 Pet., 634.

The above case was an application to this court for a writ of mandamus to the judge of the District Court of the United States for the Northern District of New York, "requiring said court to admit such amendments in the form of pleading, or such evidence as may be necessary to aver or to ascertain the jurisdiction of said court in the several suits aforesaid;" or, "requiring such judge to direct and cause full records of the judgments or orders of dismissions in the several suits aforesaid, and the processes of the same, to be duly made up and filed, so as to enable this court to re-examine and decide the grounds and merits of such judgments or orders upon writs of error," etc., etc.

If, as this court decides in the above case, it will not exercise any control over the proceedings of an inferior Federal tribunal, and compel such court to admit amendments to pleadings in cases depending in such court, for a much stronger reason will it refuse to exercise such control over the record of the court of last resort, in a cause adjudicated in that court.

It might also be suggested there was no minute or memorandum of the court by which the amendment could be made, if within the power of the court. Neither can the records of a court be impugned by counter evidence. Plaintiff in error sought to have the court change the record of a former term on *ex parte* affidavits.

IV.

The desired amendment was inconsequential, and its refusal did not injure plaintiff in error, nor would its allowance affect the judgment.

If it be conceded that the court had power to make the desired change, and that sufficient grounds were shown for making the change, and that this court has jurisdiction of the case, still we contend there was no error for which this court will interfere with the judgment of the Illinois court.

The gist of the judgment of the Supreme Court of Illinois is, that in the judgment of the Criminal Court there is no error. The judgment of that court is that plaintiff in error be hanged by the neck until dead. The recital which it is sought to have changed is merely a recital of the court leading up to the judgment. It is no necessary part of the judgment; neither does it impose any burden on the accused, nor determine any issue between the parties. Even if it be necessary—which we deny—that the record shall show the presence of the plaintiff in error in the Supreme Court at the time final judgment was rendered, there is no requirement that that shall be shown by the judgment itself. It may as well be shown by a separate record, leaving the judgment merely to adjudge the issues, which is, in fact, the judgment. Even in that case, as the full racord is not brought up, the court would presume that the record contains everything necessary to support the judgment, and would suppose the necessary recital to be elsewhere shown in the records.

As before shown, the recitals and findings are not parts of the judgment. Therefore, if the clause complained of be stricken out entirely, the judgment remains as perfect as it now is against the plaintiff in error. The judgment of the Criminal Court would still be affirmed. Hence the change is immaterial. This court will not review a judgment on immaterial error.

Also, as shown in the argument in the Schwab case, which is asked to be considered here, the petitioner, or plaintiff in error, had no right to be present in the Supreme Court at the argument or decision of the case in that court. Hence a recital that he was present, whether true or false, would not injure him, and would not be an error of which complaint could be made by plaintiff in error.

SCHWAB'S CASE.

On the 25th day of September, 1890, Michael Schwab caused to be filed in the Circuit Court of the United States for the Northern District of Illinois, a petition for a writ of habeas corpus, averring that he is unlawfully detained in said penitentiary in the custody of the warden thereof, and praying to be discharged therefrom. Printed Rec., pp. 1 to 11.

The Attorney General of Illinois filed a demurrer (general and special) to the petition. Printed Rec., 13.

Upon hearing, the court sustained the demurrer. Thereupon, petitioner took leave to amend his petition, and, after amendment, the Attorney General, under leave of court, re-filed the demurrer. Printed Rec., 15.

The court again, on October 7th, sustained the demurrer to the amended petition and dismissed the petition at the cost of petitioner, from which judgment this appeal is prayed.

The petition, as amended, averred that:

1. Petitioner is a subject of the Kingdom of Germany.

2. That he was indicted for murder and convicted.

3 That he is unlawfully imprisoned and kept at hard labor in the penitentiary at Joliet by the warden, A. W. Berggren.

4. That the only claim set out for the detention and imprisonment of your petitioner by said Berggren, as claimed by said Berggren, is contained in the papers hereto attached, and marked exhibits "A," "B," "C," and "D."

(Exhibit "A" is a copy of the letter of commutation from the Governor to the sheriff of Cook county. Exhibit "B" is a copy of the letter to the warden directing him to receive and detain said Schwab. Exhibit "C" is a copy of the judgment of the Supreme Court of the State of Illinois affirming the judgment of the Criminal Court of Cook county. Exhibit "D" is a copy of the judgment of the Criminal Court of Cook county sentencing appellant to suffer the death penalty.)

5. That ' said claimed authority, and the detention and imprisonment and keeping at hard labor of petitioner, is in violation of the laws and constitution of the United States and of the State of Illinois."

6. That petitioner is not guilty of the murder charged.

7. That the Supreme Court of the State of Illinois entered and passed a certain sentence of death upon this petitioner fixing the date of execution November 11th, 1887, as will more fully appear from a copy of said sentence of

death, hereto annexed and marked exhibit "C," which is also set out in full in the petition. The material part of this judgment is:

> "Therefore it is considered by the court that the judgment aforesaid [in the Criminal Court of Cook county] be affirmed in all things as to each and every of said plaintiffs in error and stand in full force and effect, notwithstanding the said matters and things therein assigned for error. And it is further ordered by the court that the eleventh day of November, A. D. 1887, be and the same is hereby fixed as the time when the sentence of death pronounced upon said plaintiffs in error. August Spies, Michael Schwab [and others named] by the Criminal Court of Cook county, Illinois, shall be executed. And it is further ordered that the sheriff of Cook County, Illinois, be and he is hereby ordered and directed to carry into execution the sentence by the Criminal Court of Cook county, Illinois, of the defendants in this indictment, [naming them] on Friday, the eleventh day of November, next, between the hours of ten o'clock in the forenoon and four o'clock in the afternoon of that day.

8. That when sentence was pronounced (the judgment of the Supreme Court) petitioner was confined in the county jail of Cook county, and was not at any time in the Supreme Court, and that the recital in the judgment, "On this day came again the said parties," is false and untrue; that petitioner was not present, and that the imprisonment is in violation of the laws and Constitution of the United States and is in violation of the laws and Constitution of the State of Illinois, and the sentence is void for want of jurisdiction of the person, and the sentence is no authority for the warden to detain petitioner in custody.

The same general and special demurrer was filed to the amended and original petition, and the special points made in the demurrer applicable to the petition as amended are:

1. The petition does not inform the court as to the real cause of detention but only what Berggren claims concerning it.

2. The reason given as to the alleged illegality of said detention relates solely to the character of certain papers therein referred to and discloses no ground for the discharge of the prisoner.

3. The claim that the detention is in violation of the Constitution and the laws of the State of Illinois is superfluous and relates to a matter over which this court has no jurisdiction

4. The allegation that the Supreme Court of the State of Illinois had no jurisdiction of the prisoner is insufficient in that the petition does not show in what manner the court obtained the pretended jurisdiction of the person.

5. Denial of the truth of the record and the offer to prove its falsity is an attempt to impeach the record of the court in a collateral proceeding by extraneous testimony.

6. The petition does not aver or show that the matters set out are the only authority upon which the prisoner is detained.

7. The matters alleged in the petition do not present questions over which this court has jurisdiction.

I.

ARGUMENT.

First, as to what is admitted by the demurer.

The demurer only admits the truth of matters which are well pleaded. In order to determine the force or weakness of some of the allegations of the petition, it may be material to refer to the statutes of the State of Illinois. The petition shows that the petitioner was arrested in Cook county and indicted for murder, to which indictment he pleaded "not guilty." The only court in which he could be indicted or convicted in Cook county is the Criminal Court of Cook county.

See Rev. Stat., Ch. 38, Div. X., Secs. 2 and 3.

Exhibit "D." of the petition (Record, p. 17) shows a verdict of guilty and a judgment by the Criminal Court of Cook county sentencing petitioner to be hanged. Exhibit "C." (Record, 9) shows a judgment of the Supreme Court of the State of Illinois affirming in all things the judgment of the Criminal Court of Cook County. The entry of this judgment necessarily involved the finding by the Supreme Court that it had jurisdiction of the person and the subject matter.

The finding of the Supreme Court upon its jurisdiction under the laws of the State is conclusive.

Davis v. *Packard et al.*, 8 Peters, 312.

The Supreme Court has no original jurisdiction in criminal cases. It can obtain jurisdiction of a criminal case only by writ of error.

Const. of Illinois, Art. VI., Sec. 2.
Rev. St., Ch. 38, Div. XIII., Sec. 17.
Rev. St., Ch. 38, Div. XV., Sec. 1.
Rev. St., Ch. 110, Sec. 88.

And can obtain that jurisdiction only at the instance of the accused.

Rev. St., Ch. 38, Div. XV. Sec. 1.
Rev. St.. Ch. 38, Div. XIII., Sec. 17.

For statutory and constitutional provisions of the State of Illinois, see Appendix "A."

Opinion of Justice Scholfield, *in re* Fielden, 128 Ill. 595.
See printed record in Fielden case, p. 20.

It follows that the suit in the Supreme Court was commenced by the petitioner and others impleaded with him. The title of the case and the judgment (Record p. 10) also refer to them as the plaintiffs in error. So far, therefore, as petitioner is concerned the suit in the Supreme Court of Illinois was brought by himself. He necessarily placed himself within the jurisdiction of that court so far as the hearing and determining of that case is concerned. The power of the court was simply to examine the record and decide whether or not there was error in the proceedings of the Criminal Court of Cook county and affirm or reverse the judgment of the lower court, and he placed the record before the court for such examination.

Rev. Stat. Ch. 38, Div. XV, Sec. 1.
In re. Fielden. 128 Ill. 595.
Spies v. *Illinois*, 123 U. S. 131.

In case of affirmance the judgment is that there is no error, and the judgment of the Criminal Court is in all things affirmed, and the court shall direct the court in which original sentence was rendered to carry the same into effect, and shall fix the time for executing sentence.

Rev. Stat. Ch. 38. Div. XV. Sec. 2,8.

The record shows that sentence of death was rendered in the Criminal Court of Cook county. (Record 17. Exhibit "D.") That judgment was affirmed in the Supreme Court. No new sentence was passed. The court also fixed the time for execution as required by the statute. Record 9. Exhibit "C."

Rev. Stat. Ch. 38, Div. XV. Sec. 2.

We submit that these things are all shown by the petition and the laws of the state, and that therefore general allegations in the petition seemingly at variance with the conclusions as shown by specific allegations of the petition are not admitted by the demurrer. Although the petition avers that petitioner is ulawfully detained, the demurrer does not admit an unlawful detention, if the further facts set out in the petition show a lawful detention. The allegation that he is unlawfully detained is only a conclusion of the pleader on a question of law. And so the allegation that petitioner was sentenced to death by the Supreme

Court, is not admitted by the demurrer because the judgment of that court shown by the copy presented in the petition, taken in connection with the laws of the state, and the copy of the judgment of the Criminal Court shows that he was not sentenced to death by the Supreme Court, but by the Criminal Court.

The Supreme Court found that there was no error in the judgment of the Criminal Court. That judgment had remained in force, but the execution had been stayed. The Supreme Court removed the stay and fixed a day for execution of the sentence of the Criminal Court. As the petition taken as a whole shows this, this is what the demurrer admits, and not the contradicting statement that sentence of death was passed by the Supreme Court.

Petitioner was indicted, tried and convicted in the Criminal Court of Cook county. *He* took the case to the Supreme Court asking to have the judgment reversed. The only jurisdiction the Supreme Court had was to consider the record and to affirm or reverse the judgment of the Criminal Court upon questions passed upon in the trial court. See citations above, and *Spies* v. *Illinois*, 123, U. S. 131, where the court say: "As the Supreme Court of the State was reviewing the decision of the trial court, it must appear that the claim was made in that court, because the Supreme Court was only authorized to review the judgment for errors committed there, and we can do no more."

The judgment of the Supreme Court was that the judgment of the Criminal Court of Cook county be affirmed in all things. Rec. 4.

A day was fixed for the execution of the sentence pronounced by the Criminal Court of Cook county, and the sheriff was directed to carry into execution the sentence by the Criminal Court of Cook county on that day.

The sheriff held the petitioner in custody under authority of the judgment of the Criminal Court of Cook county and not under the judgment of the Supreme Court.

The commutation of sentence by the Governor did not commute the sentence of the Supreme Court, but the sentence of the Criminal Court of Cook county, or the punishment imposed by it.

Record 8, Ex. "A." and 9, Ex. "B."

Upon suing out the writ of error to the Criminal Court in a capital case, the Supreme Court or a judge thereof upon a sufficient cause shown, makes the writ a supersedeas. It does not, however, affect the judgment of the Criminal Court but only stays the execution of that judgment.

Rev. Stat. Ill., Ch. 38, Div. XV, Sec. 1.

The Supreme Court at no time affects that judgment unless upon final hearing it reverses it. Otherwise the court simply refuses to interfere with it. And the statute even prohibits the court or judge from discharging the prisoner from jail pending the hearing of the writ of error. Par. 4, Sec. 1, *supra*.

The prisoner remained in the custody of the sheriff, and the Governor commuted his sentence of death to imprisonment in the penitentiary for life. He directed the warden to receive and detain the prisoner. No warrant is required. Where a judgment of imprisonment is entered, a certified copy of that judgment is the authority and the only authority to the sheriff under the laws of Illinois, to deliver the prisoner to the warden of the penitentiary and for the warden to receive and hold the prisoner.

Stat. Ill., Ch. 38, Div. XIV, Sec. 18.

That section is, "When a convict shall be sentenced to imprisonment in the penitentiary, the clerk of the court shall forthwith deliver a certified copy of the judgment to the sheriff, or other proper officer of the county, who shall without delay convey the convict to the penitentiary of the State, and deliver him to the warden thereof."

The judgment imposing the death penalty directs the sheriff to execute it. Record 17, Ex. "D.," and a certified copy thereof would be evidence of his authority.

Sec. 2, Div. XV, Ch. 38, R. S., delares, "If the judgment is affirmed, the Supreme Court shall, by order, fix the time when the original sentence of death shall be executed, a copy of which order shall be sufficient authority to the sheriff for the execution of the prisoner at the time therein specified."

Sec. 1, Ch. 108, Rev. Stat. Ill., declares, "That the penitentiary at Joliet, in the county of Will, until otherwise provided by law, shall be the general penitentiary and prison of this State for the confinement and reformation, as well as for the punishment of all persons sentenced by any court of competent jurisdiction in this State, for the commission of any crime the punishment of which is confinement in the penitentiary, in which the person so sentenced shall be securely confined, employed at hard labor and governed in the manner hereinafter directed."

The warden has the supervision of the penitentiary—Ibid. Sec. 16.

We submit, then, that the admissions of the demurrer as to the allegations of the petition are:

1. That the petitioner is a subject of the King of Germany.

2. That he is detained and imprisoned and kept at hard labor in the penitentiary at Joliet, Will county, Illinois, by A. W. Berggren, acting and officiating as warden of the penitentiary of the State of Illinois.

3. That the claim of the warden as his authority for the detention of the prisoner is,

a. The judgment of the Criminal Court of Cook county sentencing the prisoner to death.

b. The judgment of the Supreme Court affirming said judgment.

c. Commutation of the punishment by the Governor to imprisonment in the penitentiary.

d. Letter from the Governor to the warden directing him to receive and detain the prisoner.

Respondent further submits that the other allegations in the petition, are mere deductions of the pleader and are not allegations of pleading which the demurrer admits, except as to the allegation that the petitioner was not present in court when the judgment of the Supreme Court was passed.

As to that allegation we submit that the demurrer does not admit the truth of the allegation, but that the petition itself shows the record of the court on this question, and the pleadings are an attempt to impeach the record which cannot be done.

Spies v. *Illinois*, 123 U. S., 131.

The demurrer only admits whatever is necessary to sustain a judgment on all the allegations. If all the allegations show a fact which cannot be contradicted by the pleader the demurrer does not admit such contradiction.

II.

Upon these admissions of the demurrer we submit first, that the allegation that petitioner is a subject of the king of Germany is wholly immaterial. He is indicted for and convicted in the courts of the State for a violation of the laws of the State; is in the custody of the proper officer of the State in pursuance of the judgments rendered against him modified by the exercise of the power of commutation vested by the constitution in the Governor of the State of Illinois. In this respect he is entitled to the same impartial trial, the same rights and protection as a citizen of the United States and to no other.

Sec. 1977 of the Statutes of the United States declares:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts * * * as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other."

In re Jugiro, 140 U. S., 291.

Second, the detention by the Warden is admitted and we contend that it is lawful.

Petitioner was convicted in the Criminal Court of Cook county and sentenced to be hanged. Record, 17, Ex. D. Appellant's Brief, p. 1. He sued out a writ of error from the Supreme Court of the State, where the judgment of the Criminal Court of Cook county was affirmed in all things, and the sheriff was directed to execute the judgment of the court (the Criminal Court) on a day fixed by the Supreme Court. The petitioner was in custody of the sheriff of Cook county, to whom a certified copy of the judgment of the Criminal Court, and a certified copy of the judgment of the Supreme Court were authority to act, and to inflict the penalty imposed. Before the day designated for the execution, the Governor of the State commuted the punishment to imprisonment in the penitentiary for life. The Constitution of the State of Illinois confers on the Governor power to grant pardons, commutations and reprieves after conviction for all offenses, subject to such regulations as may be provided by law relative to the manner of applying therefor.

Const. Ill., Art. V., Sec. 13.

The statute provides that all applications for reprieves, commutations and pardons shall be made by petition in writing to the Governor, signed by the party under conviction, or other person in his behalf, etc.

Stat. Ill., Ch. 104a, Sec. 1.

There is provision of the constitution or laws of the State declaring how the Governor shall exercise his power or specifying any formality to be followed by him. The power may then be exercised in such manner as the Governor may choose. He sent a communication to the sheriff commuting the sentence to imprisonment in the penitentiary, and sent a communication to the warden (Ex. "B.") directing him to receive and detain in custody the petitioner. These clearly expressed the intention of the Governor and furnished all the authority to the warden to receive and detain the prisoner that the Governor could bestow upon him. Therefore the warden had full authority to receive and detain the prisoner whether the sheriff had any direction or not to convey the prisoner to the penitentiary. The prisoner was properly in his custody and he conveyed him to the penitentiary and delivered him to the warden, who had authority to receive and detain him, and who now holds him under that authority.

III.

PRESENCE OF THE ACCUSED IN THE SUPREME COURT.

There is an allegation in the petition that Schwab was not present in the Supreme Court at the time judgment was rendered. His absence as set forth in the petition is the main ground relied on for the relief asked by the prisoner.

First, we would suggest that the record of the judgment in the Supreme Court shows that Schwab was present in that court (Rec. p. 4) and that record cannot be impeached in a collateral proceeding by the affidavit of the petitioner, a plaintiff therein.

Spies v. *Illinois*, 123 U. S. 131.

That record imports absolute verity and where petitioner shows the judgment as authority for any act, that judgment must be taken in its entirety as it is written and cannot be disputed in whole or in part as to its correctness. If then the record cannot be collaterally impeached or contradicted by a statement of fact inconsistent therewith, it follows as a matter of law that no such statement of fact can entitle the prisoner to legal relief as against the judgment, in other words that such statement sets up no ground of action, and this is the point raised by the demurrer.

But we contend that the presence of the petitioner in the Supreme Court was not required and the allegation to that effect was immaterial. We deny that the Supreme Court sentenced the petitioner to suffer the death penalty. As before stated he took the case to the Supreme Court. His suing out a writ of error was the beginning of a new suit. The only power the court had as to the record was to determine whether or not there was error in the proceedings of the Criminal Court. It could not determine or pass upon the guilt or innocence of the accused. It passed judgment affirming the judgment of the Criminal Court of Cook county. That is to say the record of the proceedings in the case in the Criminal Court do not show that any error was committed in that court. The Supreme Court is purely a court of review, and neither constitution, law nor practice requires the presence of the accused at such review. The right of the accused to be brought face to face with the witnesses is a right pertaining to his trial in the trial court where the question of his guilt or innocence is the issue submitted for determination. The Supreme Court does not pass upon the guilt or innocence of the accused. In the Supreme Court there are no witnesses and there is no trial except to determine the correctness of the proceedings of the trial court. No law requires it, and it has never been the practice to require the presence of the accused at such review, nor is it the practice generally in the Supreme Courts of the several states as will be hereafter conclusively shown.

It has been held that the prisoner must be in custody or upon bail when such case is under review so that he may be called upon to respond to the judgment of the court. Where not admitted to bail, however, the prisoner remained in the custody of the sheriff subject to the demands of the trial court, and when admitted to bail the conditions of the recognizance require him to respond to the demands of the trial court and not to the Appellate Court.

This is the uniform rule of the statutes of the various states so far as any legislation on that subject can be found and no court has condemned the rule. And there is no more reason that the prisoner should be present in the highest court of the State when his case is there reviewed on the record than that he should be present in this court when its writ of error brings the same record from the highest court of the State to this court for review; or that the appellant in this proceeding should be now present in this court pending the present hearing.

In Chitty's Criminal Law, 696, it is said "So when judgment has been once pronounced on a traitor, and execution awarded against him, which is subsequently countermanded, so that he is not put to death at the time specified, and part of the ensuing term has elapsed, execution can not afterwards be awarded, without bringing him again to the bar in person."

That this was once the rule at common law, it is not necessary to deny, but even there it was a rule of procedure in *nisi prius* courts.

As a rule, however, it can have little or no application to the practice in *nisi prius* courts in Illinois, and none whatsoever to this case.

In the first place, the common law of England, prior to the fourth year of James the First, is in force in the State of Illinois, only so far as it has not been repealed by statute. (Rev. Stat. 1874, Chap. 28, Sec. 1.) The power of the State to alter, modify or repeal the common law is too well settled no need argument in its support.

By Section 499 of the Criminal Code of the State of Illinois, power is given to the court to prolong the time of execution of sentence of death, for good cause. This power is given to the trial or *nisi prius* court, but its exercise is not in question here, because no prolongation of time was granted by that court. Whether, in case of such prolongation of time by the trial court, it would be necessary under the laws of Illinois to bring the accused before the court for fixing a new day for execution, it is unnecessary to discuss.

Aside from this power of the trial court to prolong the time as above suggested, there are but two ways in which an order commanding the execution of sentence of death can be countermanded, viz.: *First by supersedeas* issued by the Supreme Court, in aid of writ of error; *second*, by reprieve issued by the Governor.

The Texas Court of Appeals said:

"It is provided in our constitution that 'in all criminal prosecutions the accused shall have a speedy public trial, by an impartial jury. * * * He shall have the right of being heard by himself or counsel, or both; shall be confronted with the witnesses against him, etc.' (Const. Bill of Rights Sec. 10.)

"This identical provision is found in the constitution of 1845 (1 Pas. Dig. p. 48), and has been retained unaltered in each subsequent organic instrument. In the sixth article amending the constitution of the United States, the provision is that the accused 'shall have the assistance of counsel for his defense.' (Rev. Stat. p. 7.)

"Mr. Cooley says: 'With us it is a universal principle of constitutional law that the prisoner shall be allowed a defense by counsel.' (Cooley Const. Lim. 4th ed. p. 412.)

"In addition to counsel, our constitution, it will be noted, gives him the right 'of being heard by himself.'

"At *nisi prius* trials, the right of being heard cannot be denied the accused.

"In *Wood* v. *The Commonwealth*, 3 Leigh, Virginia, 805, it was held that 'upon the trial of a question of fact in a criminal case the accused has the right to be heard by counsel before the jury, and the court has no right to prevent him from being heard, however simple, clear, unimpeached and conclusive the evidence in its opinion may be.' And in *The People* v. *Keenan*, 13 California, 581, the court say: 'It is unquestionably a constitutional privilege of the accused to be fully heard by counsel. An opportunity must be afforded him for full and complete defense.'

"We are of the opinion that a fair and legitimate construction of our constitutional provision limits the right of a defendant to be 'heard by himself' to the *nisi prius* trial. The language of Section 10 show that the intention was to declare rights pertaining to the trial before a jury or court where the charge was being investigated on the introduction of evidence. This we think apparent from the reading of the section, which is: 'In all criminal prosecutions the accused shall have a speedy public trial, by an impartial jury, He shall have the right to demand the nature and cause of the accusation against him He shall not be compelled to give evidence against himself. He shall have the right of being heard by himself or counsel, or both; shall be confronted with the witnesses against him, and shall have compulsory process for obtaining witnesses in his favor. And no person shall be held to answer for a criminal offense unless on an indictment by the grand jury, etc.' Evidently these matters all relate to proceedings in the trial court: and the order of argument in the trial court is especially provided for by statute. (Code Crim. Proc. Art. 667,668.) That the construction we have placed upon the defendant's right to be heard in person is correct is further shown by the legislative declaration that 'the defendant to a criminal action need not be personally present upon the hearing of his cause in the court of appeals; but he may appear in person in cases where by law he is not committed to jail upon appeal.' (Code Crim. Proc. Art 840); and 'where the defendant appeals in any case of felony he shall be committed to jail until the decision of the Court of Appeals can be made and received.' (Code Crim. Proc. Art. 841.)

"Presentation and argument of cases on appeal are regulated by the rules of the court. In criminal cases the same rules as are prescribed for the Supreme Court in civil cases apply to the Court of Appeals. (Sec. 2, Texas Court of Appeals, pp. 637, 638, 639 and 645.) There is no rule other than that mentioned in Article 840, Code of Criminal Procedure, *supra*, contemplating the fact of the personal presence of the accused in the Court of Appeals on the hearing of an appeal.

Besides the fact that there is no law for such procedure, the impolicy of such a rule is strikingly apparent. In the first place, there is no necessity for his appearance, since all the matters which can legitimately come before the court should be, and are supposed to be, in the transcript of record. And again, if the rule should be established or recognized, there is not an appealed felony case scarcely in which the right would not be claimed and demanded, and the State subjected to thousands of dollars of needless and useless expense in complying with it. We do not think any such right is even contemplated, much less guaranteed, by the constitution and laws of the State; and we are further of the opinion that the establishment of such a procedure would be decidedly detrimental to the pecuniary interest of the State, without proving of any the least practical benefit to parties appealing. Appellant's motion to be brought in person before this court to enable him to present his appeal is overruled."

Tooke v. *The State*, 23 Tex. Ct. of Appeals, 10.

In the foregoing case appellant was convicted of swindling, and sentenced to four years in the penitentiary.

It is there clearly held that the guaranty in Section 10 of the Bill of Rights, to one accused of crime, to be present and to be heard in person and by counsel, has reference exclusively to trials in *nisi prius* courts, and can not be stretched so as to confer on a person convicted of crime the right to appear personally in the Appellate Court at the hearing of his appeal.

When plaintiff in error had broken jail, this court held that unless he returned and submitted himself to the jurisdiction of the *court below* on or before the first day of the next term of the court, the cause is to be left off the docket after that time. Chief Justice Waite said: "We are not inclined to hear and determine what may be a moot case."

Smith v. *U. S.*, 94 U. S., 97.

But there was no intimation that there was any necessity the plaintiff in error should be present in the Supreme Court.

In a similar case, it was ordered that the appeal stand dismissed unless the defendant surrender himself into custody of the proper officers of the law before the first Monday of May following.

People v. *Redinger*, 55 Cal., 290, and many cases cited. But none of them hold that the presence of the accused in the Appellate Court is necessary.

"The absence of the accused during the trial of motions not making part of the actual trial of his guilt or innocence, but having reference to the form or conduct of trial, will not vitiate the proceedings. *State* v. *Fahey*, 35 Ann., 9; *State* v. *Clarke*, 32 Ann., 560; *State* v. *Harris*, 34 Ann., 121; *State* v. *Gonsoulin*, 38 Ann., 459."

State v. *Dominique*, 39 La. Ann., 323.

"It is not necessary in any criminal case that the defendant shall be present in this court when his case is heard and determined. Indeed, he is seldom, if ever, present. He appears here generally by counsel. He is not tried or convicted, nor is any judgment rendered against him here. The court decides whether or not there was error in the proceedings in the case in the court below, and orders that the decision be certified to that court to the end that the proper judgment may be entered there. *State* v. *Overton*, 77 N. C., 485."

State v. *Leak*, 90 N. C., 655.

In a capital case where the accused escaped from jail while his appeal was pending in the Supreme Court, judgment was affirmed therein while he was still a fugitive from justice. He was afterwards recaptured and then made his motion to vacate the orders of the Supreme Court so made in his absence and while he was a fugitive. The court discussed the question at length, and said:

"But it is not essential in North Carolina, where the Appellate Court does not review the facts, that the client, though indicted for a capital felony, should be present in the court, or should be in actual or constructive custody, so as to communicate with his counsel after the trial in the court below, including judgment, exceptions and appeal, is ended. In *State* v. *Overton*, 77 N. C., 486, Justice Reade, for the court, says: 'The Constitution provides that a defendant to a criminal action shall be informed of the accusation against him, and shall have the right to confront the accusers with other testimony, and shall not be convicted except by the unanimous verdict of a jury of good and lawful men in open court, as heretofore used. That is *his trial*. This, of course, implies that he shall have the right to be present. If he complains of any error in his trial, the record of the trial is transmitted to this court. * * * It has never been understood, nor has it been the practice, that the defendant shall be present in this court, nor is he ever 'convicted' here.' See also *State* v. *Leak*, 90 N. C., 656."

State v. *Jacobs*, 107 N. C., 772.

Again, the court say, in the same case:

"But now that it is settled that even one convicted of a capital felony may be represented by counsel (and not in person) when this court hears argument on his exceptions, and that this court may affirm the judgment of the court below and direct the clerk to notify the Governor so that a death warrant may issue in the absence both of client and counsel, it is difficult to discover any principle of constitutional common or statute law that gives a defendant who is in hiding and in contempt the right to insist upon setting aside and annulling a judgment of this court because he was 'in the woods,' instead of in the prison, and could not, therefore, communicate by letter or by telegram with counsel engaged to represent him and to protect his interests in this court."

"The Constitution guarantees to the accused the right of being heard by himself or counsel. It is said that he cannot be heard unless present. We are of the opinion that this guaranty applies only to to the courts in which facts are to be inquired into, and the accused to be confronted by witnesses against him."

Phleming v. *State*, Minor, 42, (Ala.).

Where a person had been convicted and sentenced to the penitentiary at Auburn, the court, in the absence of the prisoner, modified the order, fixing the Erie County Penitentiary as the place of confinement. Held that Congress clearly recognized a distinction between a sentence and an order for the execution of the sentence, and that in the action of the court there was no error.

Ex parte Waterman, 33 Fed. R., 29.

Neither is the presence of the prisoner required in this court on writ of error to the Supreme Court of the State in criminal cases.

The trial of the plaintiff in error was in the Criminal Court, and not in the Supreme Court. The judgment of the Criminal Court remained in force during the pendency of the writ of error. The writ of error only stayed the execution, but during all the time it had all the validity of a judgment, and it is the judgment on which execution is ordered. The affirmance of the judgment by the Supreme Court was not a *revival* of the judgment of the Criminal Court. It was simply a *removal* of the stay of execution.

WHERE APPEAL OR WRIT OF ERROR STAYS EXECUTION IT DOES NOT AFFECT THE JUDGMENT.

Although appeal or writ of error is a matter of right, the matter of bail, pending the appeal, stands upon a different footing. It rests in the discretion of the court or one of the justices. The appeal or writ of error does not stay the execution.

Com. v. *Myers*, 137 Pa. St., 407.

"At the May term, 1886, of Orangeburg county court, appellant was convicted of murder and sentenced to be hanged on July 2, 1886. An appeal was taken to the Supreme Court, and on February 28, 1887, that court rendered its decision as follows:

"The judgment of this court is, that the judgment of the Circuit Court be affirmed," and in accordance therewith the remittitur was duly sent down and filed in the Circuit Court. At the May term, 1887, of the Court of Sessions of Orangeburg county, the prisoner was put to the bar, and after reciting the provisions in the usual form, execution of the sentence previously imposed, was awarded and the same was directed to be carried into effect on June 3, 1887.

The defendant appealed on the following grounds:

1. Because there was no authority of law for the sentence and award of execution.

2. Because there was nothing in the judgment of or in the remittitur from the Supreme Court to the Circuit Court, directing or authorizing said sentence or award of execution.

As we gather from the argument here, the real point intended to be made, by these grounds of appeal is, that the appeal operated as a supersedeas of the judgment originally rendered by the Circuit Court, and that until the judgment of the Supreme Court had been made the judgment of the

Circuit Court, by an order for that purpose, there was no judgment of which the Circuit Court could award execution.

This proposition rests upon the unfounded assumption that the former appeal operated as a supersedeas of the judgment originally rendered.

Our act to regulate the appeals in criminal cases (18 Stat., 737) does not provide that an appeal shall operate as a supersedeas of the judgment appealed from; but, on the contrary, expressly provides that a notice of appeal in such cases "shall operate as a stay of the execution of the sentence until the appeal is finally disposed of."

This necessarily implies that the appeal, of itself, has no effect whatever upon the judgment, but simply operates "as a stay of the execution of the sentence," which is the judgment in a criminal case. *State* v. *McKittrick*, 13 S. C., 439. Hence, until it is reversed by the tribunal to which the appeal is taken, it stands unaffected by such appeal, except that it cannot be enforced by execution "until the appeal is finally disposed of."

But when the appeal is disposed of and it has been ascertained, by the judgment of the tribunal invested with jurisdiction for that purpose, that there is no error of law in the judgment appealed from, there is then no longer any obstacle to its enforcement—no longer any stay of its execution—and it then becomes not only the right, but the duty of the tribunal which originally rendered such judgment to provide for its due execution. Where a judgment of the Circuit Court is simply affirmed by the judgment o the Supreme Court, that does not make the judgment so affirmed, a judgment of the Supreme Court, and hence, in such a case, we can see no necessity for making the judgment of the Supreme Court the judgment of the Circuit Court.

It was said in *Adjer & Co.* v. *Pringle*, 13 S. C., 33;

"It is contended that there should have been an order making the judgment of the Supreme Court the judgment of the Circuit Court, and that, until such order was made, the Circuit Court had no jurisdiction to proceed with the case. If the judgment of the Circuit Court had been varied or modified, there would be ground for an order making the judgment of the Supreme Court that of the Circuit Court, but such was not the case. No authority has been shown as rendering it necessary that an affirmed judgment should be supported by such an order, and there is no reason for such conclusion."

"We can very well understand that, in the case where the Supreme Court modifies or alters the judgment appealed from, an order may be necessary to make such modified judgment the judgment of the Circuit Court, before that court, confined as it is, to the enforcement of its own judgments, could proceed to enforce such modified judgment; but when the Supreme Court simply affirms the judgment of the Circuit Court, thereby declaring that it is a valid judgment of that court, and free from any error, we are unable to see any reason why, in such a case, the judgment of the Supreme Court should be made the judgment of the Circuit by a formal order to that effect.

"The remittitur sent down from this court officially informed the circuit judge that the judgment of the Circuit Court which had been appealed from was a valid judgment free from any error of law, and that the appeal therefrom had been finally disposed of. This removed the stay of execution provided for by the statute, and it then became the duty of the circuit judge to assign a new day for the execution of the judgment previously pronounced."

State v. *Prater*, 27 S. C., 599.

We have set forth the foregoing opinion at length because we regard it as an admirable discussion and exposition of the theory and philosophy of appellate jurisdiction, or jurisdiction in error, as entertained by the Supreme Court of Illinois. Neither the issuing of a writ of error nor of a supersedeas auxilliary thereto, has any effect upon the judgment of the Criminal Court of Cook county, pending the hearing on the writ in the Supreme Court nor until such hearing is concluded and the judgment of the trial court reversed, for error found to exist in the proceedings of the trial court. Pending such hearing the judgment of the trial court remains in full force and virtue, its execution alone stayed and suspended by the supersedeas. Should no supersedeas be issued in aid of the writ of error, as often happens, then not even the execution of the judgment is stayed. If, on final hearing on error, the judgment of the trial court is affirmed, then such judgment remains in fact from the date of its entry, wholly unaffected by the fact that a writ of error was ever prosecuted or that a supersedeas staying its execution was ever issued. Whatever force operates upon the party against whom the judgment was rendered emanates from such judgment, as the judgment of the trial court, and not as the judgment of the Supreme Court. The action of the last named tribunal imparts to the judgment no greater force, no higher authority, no higher sanctity; and the execution follows by virtue of such judgment, unaffected by any action of the Supreme Court, from the moment said tribunal withdraws its supersedeas by the operation of which, execution was temporarily stayed.

"But the judgment in error in capital cases, as in others, is simply of affirmance or reversal of the sentence pronounced upon the prisoner by the court below. By virtue of that sentence he is executed. The mandate for execution issues from the court below, not from the Court of Errors. The prisoner is executed by virtue of that mandate. The writ of error does not suspend its execution or impair its efficacy. If the judgment of the court below is not reversed, if their mandate for execution is not annulled, it will be the duty of the sheriff to execute it, notwithstanding the writ of error. Such was the unanimous opinion of this court in *The State* v. *Fox*, and the judgment in that case was conformed to the judgment in the Court of Errors in the case of *The State* v. *Parke* and *The State* v. *Carter*. Such must have been the opinion of the late Chief Justice and of the Court of Errors, by whom judgment was rendered in those cases. Such must have been the opinion of the learned Attorney General, by whom those prosecutions were conducted, and the able counsel by whom they were defended. No new mandate was issued. The prisoners were executed under the sentence of this court.

"But that the execution is done by virtue, not of the judgment of the Court of Errors, but of the court below, is manifested from the fact that the writ of error is often brought after the judgment is executed, or while it is in process of execution. In England, writs of error in capital cases were more usually brought by the heir, after execution for felony, to reverse the attainder. So in *Cook* v. *The State*, the sentence had been executed—the fine had been paid before error brought. In the cases of Price, of West, and of Dodge, which will be hereafter more particularly referred to, the plaintiff in error was in prison, undergoing the sentence of the court below, while the case was pending in this court upon error. In case of reversal, he must be brought before this court to be discharged from imprisonment. But in case of affirmance, is a new sentence to be pronounced, and is he to endure one part of his punishment upon the sentence of one court, and the balance upon the sentence of another? The inquiry carries its answer upon its face. No such practice has ever been adopted.

"But if the presence of the prisoner is necessary in cases of murder to conduct a writ of error, or to receive the judgment of the court, it is upon the principles of the English law equally so in all other cases of felony or crimes above mere misdemeanors. But upon examining the precedents, we do not find a single case where, upon a writ of error, the defendant was either brought into this court or prosecuted the writ in person.

"We think it must be considered as settled by the practice in this State, that in proceedings upon writ of error, the personal presence of the prisoner in court is not a technical necessity; that he appears by counsel, errors are assigned by counsel, and judgment may be pronounced in the defendant's absence."

Donnelly v. *State*, 2d Dutcher, 470.

In support of this decision, the Supreme Court cited *The State* v. *Fox*, 1st Dutcher, 566: *Berrian* v. *State*, 2 Zab., 1; *West* v. *State*, 2 Zab., 212: *Smith* v. *State*, 3 Zab., 130; *Francisco* v. *State*, 4 Zab., 30; *Dodge* v. *State*, Feb. term, 1854; *Cook* v. *State*, 4 Zab., 483.

IV.

DUE PROCESS OF LAW.

Due process of law, within the meaning of the constitution is secured when the laws operate on all alike, and no one is subjected to partial or arbitrary exercise of the powers of government.

By the 14th amendment the powers of states in dealing with crimes within their borders are not limited, except that no state can deprive particular persons or classes of persons of equal and impartial justice under the law; that law in its regular course of administration through courts of justice is due process, and when secured by the law of the State, the constitutional requirement is satisfield; and that due process is so secured by laws operating on all alike and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice.

Caldwell v. *Texas*, 137 U. S. 692.

By chapter 118 of the General Statutes of Minnesota, it is provided:

"Section 3. When any person is convicted of any crime for which sentence of death is awarded against him, the clerk of the court, as soon as may be, shall make out and deliver to the sheriff of the county, a certified copy of the whole record of the conviction and sentence, and the sheriff shall forthwith transmit the same to the governor; and the sentence of death shall not be executed upon such convict until a warrant is issued by the governor, under the seal of the State, with a copy of the record thereto annexed, commanding the Sheriff to cause the execution to be done, and the sheriff shall thereupon cause to be executed the judgment and sentence of the law upon such convict.

"Section 4 The judge of the court at which a conviction requiring judgment of death is had, shall immediately after conviction, transmit to the governor by mail, a statement of the conviction and judgment and of the testimony given at the trial.

Section 11. The punishment of death shall, in all cases, be inflicted by hanging the convict by the neck until he is dead, and the sentence shall, at the time directed by the warrant, be executed at such place within the county as the sheriff shall elect."

In passing upon the validity of the foregoing statutory provisions this court said:

"Among the assignment of errors by the appellant is one to the effect that the 'judgment of the State District Court, that he be hanged at a time to be fixed by the governor of Minnesota, was not a valid exercise of judicial authority or due process of law thus to deprive him of life at such time as the executive should arbitrarily appoint.' We do not understand the counsel of appellant to press this point, but as this assignment of error has not been formally withdrawn, and as human life is involved in our decision, it is proper to say that under the law of Minnesota, at the time appellant committed the crime of which he was convicted, as well as when he was indicted and tried, the day upon which the punishment of death should be inflicted depended upon the warrant of the governor. It is competent for the State to establish such regulations, and they are entirely consistent with due process of law. The court sentenced the convict to the punishment prescribed for the crime of murder in the first degree, leaving the precise day for inflicting the punishment to be determined by the Governor. The order designating the day of execution is, strictly speaking, no part of the judgment, unless made so by statute. And the power conferred upon the governor to fix the time of infliction is no more arbitrary in its nature than the same power would be if conferred upon the court. Whether conferred upon the governor or the court, it is arbitrary in no other sense than every power is arbitrary that depends upon the discretion of the tribunal or the person authorized to exercise it. It may also be observed that at common law the sentence of death was generally silent as to the precise day of executions.

Atkinson v. *The King*, 3 Bro. P. C. 2d Ed. 517, 529; *Rex* v. *Rogers*, 3 Burrow, 1809, 1812; *Rex* v. *Doyle*, 1 Leach 4th Ed., 67; *Cathcart* v. *Commonwealth*, 73 Penn St. 108, 115; *Costley* v. *Commonwealth*, 118 Mass. 1, 35.

Of course, if the statute so requires, the court must, in its sentence, fix the day of execution. Equally must it forbear to do that if the statute confers upon some excutive officer the power to designate the time of infliction."

Holden v. *Minnesota*, 137 U. S., 483.

"The only remaining assignment of error is the eleventh. It is that the sentence is indefinite, no time being fixed for its being carried into effect, and no other person having legal authority to fix the time. This is certainly a novel exception to be taken at this late period in the history of the Commonwealth. It would be out of place here to show how the power to designate the time of execution is vested in the Governor. That it has always been exercised by him is not denied, and it would not be difficult to show that it has been rightfully exercised. But this question is not in this record. The matter for our consideration is, whether a sentence of death which does not appoint a day for execution is a proper sentence.

"Our act of Assembly of the 31st of May, 1718, entitled 'An act for the advancement of justice and more certain administration thereof,' enacted, that whenever conviction should happen, it should be lawful to give judgment 'according to the manner, form and direction of the laws of that part of Great Britian called England, in the like cases.' This provision was, indeed, hardly necessary, for without it, our courts being Common Law Courts, would have had that power, unless restrained by statute. The manner and form of giving judgment in England in 1718, in cases of conviction for murder, was precisely that which the court of Oyer and Terminer adopted in this case. The convict was sentenced to death by hanging, but the sentence did not fix the time and place of execution. That such was the mode and power of pronouncing judgment in capital cases, appears from all the books; Rastall's Entries. 2 Hale's Pleas of the Crown, 399. Coke's Entries, 352-3. 3 Burr, 1812. Nor was it changed by the statute of 25 Geo. 2, Ch. 37, which enacted that all persons found guilty of wilful murder should be executed on the day next but one after the sentence passed. See 3 Burrows, 1812. *Rex* v. *King, et al.*, decided in 1765.

"In that case it was said not to be usual at the Assizes to fix the day and place of execution. The judgment in this case was then strictly in accordance with the forms and requisitions of the law."

Cathcart v. *The Commonwealth*, 37 Penn. St., 115.

The opinion in the foregoing case was delivered by Judge Strong, at one time a learned member of this court. The statute under which the sentence was passed, and which the court upheld, was enacted while Pennsylvania was a

British colony, and necessarily conformed to common law procedure.

In case, *Costley* v. *Commonwealth*, 118, Mass. 30, the accused having been convicted of murder, the following judgment was entered:

"It is considered and ordered by the court that the said James H. Costley, convicted as aforesaid, be taken from this place to the common jail of the county of Norfolk, there to remain in close custody until such day as the executive government of said Commonwealth shall by their warrant appoint, and then he be thence removed to the place of execution, there to be hanged by the neck until he be dead." On petition to the Supreme Judicial Court for writ of error it was urged:

"That the sentence was erroneous." The power of making out and awarding execution in criminal as well as civil cases, and of doing all things necessary thereto is delegated to the court by the constitution. Const. c. 1, Sec. 1, Art. 3. This includes the power and duty to fix the time and place, and the legislature cannot delegate that power to another branch of the government.

"When a power is granted in the constitution to one department of the government there is an implied prohibition of it to every other department. Cooley's Const. Lim. 87-88."

The constitution expressly prohibits the executive to exercise judicial powers.

In denying the writ, the court by Gray C. J., said:

"The only objection to the sentence is that it leaves the time of execution to be determined by the Governor and council; and it is contended for the petitioner that the determination of that time is an exercise of judicial power, which by the constitution of the commonwealth is delegated to the court, and cannot be referred to another branch of the government.

"But the issue of an execution in any case, criminal or civil, is not an exercise of judicial power, but a mere ministerial act, which may be authorized by law to be done by the clerk. And the fixing of the time and place of execution is no part of the judgment or sentence of death, and may be regulated by statute, so as to be done by order of the court contemporaneously with the sentence, or by the Governor and council, or even, as by the common law of England, left to the discretion of the sheriff. *Rex* v. *Rogers*, 3 Bur., 1809, 1812. *Atkinson* v. *The King*, 3 Bro. P. C. (2d ed.), 517. *Ex parte* Howard, 17 N. H., 545, 548. *Cathcart* v. *Commonwealth*, 37 Penn. Stat., 108, 115.

"By a colonial statute of 1668, it was provided that the secretary or clerk of every court should sign all warrants for the execution of sentences of death, as of all other judgments, civil or criminal. 4 Mass. Col. Rec. pt. 2, 394; Mass. Col. Laws, (ed. 1672), 30; Anc. Char. 81. Under the Province Charter, a like practice prevailed in capital cases, and the court usually fixed the time of execution. *The King* v. *Ames*, Rec., 1773, fol. 118. *Webster* v. *Commonwealth*, 5 Cush., 407.

"But within a year after the Declaration of Independence it was enacted by the Legislature of Massachusetts that no person on whom sentence or judgment of death should be passed, should be executed and put to death in pursuance of such judgment, before the whole record of the case should be certified by the clerk of the court under the seal thereof to the supreme executive authorities of this State, nor until a warrant should be issued by said supreme executive authority under the great seal of the State, with a copy of the records thereto attached, directed to the sheriff of the county in which the trial was had, commanding him to cause execution to be done according to the judgment. St. 1777, c. 32, § 24; Mass. State Laws, 1775-1780, 111.

That statute remained in force until the passage of the revised statutes, and is re-enacted in the Rev. Sts. c. 139,

§ 11, and the Gen. Sts. c. 174, § 24. Since its passage, both before and since the adoption of the constitution, the court has never fixed the time of execution of a sentence of death, but has always left it to the determination of the Executive. *Government & People* v. *Jones*, Rec. 1778, fol. 214. *Government & People* v. *Brooks*, Rec. 1778, fol. 227. *Government & People* v. *Young*, Rec. 1779, fol. 114. *Government & People* v. *Green*, Rec. 1779, fol. 135. *Commonwealth* v. *Lobdell*, Rec. 1781, fol. 88. *Webster* v. *Commonwealth*, 5 Cush., 407.

"If any doubt could be entertaiued of the conformity of this mode of proceeding to the Constitution of the Commonwealth, as a matter of abstract theory—and we entertain none—the practical construction of nearly a century is conclusive. *Commonwealth* v. *Lockwood*, 109 Mass. 323. Petition dismissed."

This shows the construction placed by one of the ablest Common Law courts of the Union, and one whose decisions are regarded as authority on Common Law questions throughout the United States, and in England as well.

In the cases of the *People* v. *Joseph Clark*, and the *People* v. *James Sullivan*, reported in Parker's Criminal Reports, volume 1, wherein the question of the necessity of the presence of the accused in the appellate court was discussed, the Supreme Court of the State of New York said:

"The practice in our courts in this respect seems not to have been uniform. In the case of Rector, he was brought into court, and so in many other cases. In others, the argument has been without the presence of the prisoner. If the final judgment were in his favor, of course he would not object, and if the judgment of the court below were against him, and that were affirmed on his writ of error, he could not object. The cases in which the courts have proceeded without the presence of the prisoner are sufficiently numerous to lead to the conclusion that the presence of the prisoner in the higher court was not essential to its jurisdiction, even if his absence would make the proceedings erroneous. And when the highest court of this State gives a judgment which makes void an order for a new trial, and specially and carefully orders the sentence of death to be pronounced, it can hardly be supposed that it was done without that court considering that it had jurisdiction of the person of the prisoners. To obtain jurisdiction over the person, it is generally necessary only to have process served on the party, in due form of law, giving him such notice of the new action as the court regards as an equivalent to the bringing him into court. That was done in this case, by serving a copy of the writ of error on the prisoner. In other cases, especially in inferior courts, a special statute has sometimes prevented their obtaining jurisdiction unless the party were actually before the court. Such was *Bigelow* v. *Stearns*, (19 J. R. 39). In other cases it has been held that, if no process was served on a defendant and he did not appear in court by an attorney, the judgment against him was void. Such was *Borden* v. *Fitch*, (15 J. R. 141), and many others. And it may be that the express statutory provision (2 R. S. 735 and 1[illegible]) that "no person indicted for any felony can be tried unless he be personally present during such trial," would make void a trial when the person indicted was not present. But the trial there intended is that which is properly called the trial, namely, that before the jury, as the rest of the title containing that section tends to show.

"It is also true that at common law the defendant could not appear by counsel, and that the privilege to appear by counsel, now granted, was not intended to dispense with the prisoner's personal appearance. But that again, does not apply to the Appellate Court; there, it is believed, counsel could always argue for the accused. Undoubtedly, the presence of the accused may be of great service to suggest to counsel even arguments of law, for self interest often excites an acuteness of perception in the client which the learning of the counsel may have failed to exhibit. That is a fair argument why the prisoner should be present even in those cases, but not an argument to show that without his presence the Appellate Court is without jurisdiction."

In this case the prisoner had been tried at Oyer and Terminer and found guilty of murder and sentenced to death. A writ of error was prosecuted from the Supreme Court of the State, where the case was considered, and the judgment of oyer and terminer reversed. From this judgment of the Supreme Court a writ of error was prosecuted on behalf of the people in the Court of Appeals of that State, in which court the judgment of the Supreme Court was reversed and that of Oyer and Terminer in all things affirmed and the record remanded to the Supreme Court in order that that court might direct the sentence of death to be executed. In the Supreme Court, the question above discussed was raised. That part of the decision above quoted which relates to the service of process on the accused in order to make the judgment against him valid, has no application to the case at bar. In the State of Illinois, the people can not take a criminal case to the Supreme Court. No appeal or writ of error lies at their instance in a criminal case. Every such case, when taken to the Supreme Court by writ of error, must be so taken by the accused. When he has thus taken his cause to the Supreme Court, that court has jurisdiction both of the subject matter and of his person, so far as personal jurisdiction is necessary, to the consideration of the questions raised upon his record.

FIXING DAY OF EXECUTION.

In Massachusetts, formerly, a sentence of death could not be executed upon one convicted of a capital crime until a warrant should be issued by the Governor, with the advice of the council, under the great seal. This was the law of Massachusetts at the time Chitty wrote his treatise on criminal law, and continued as such from 1777 to 1876. Rev. Stat. Mass., Chap. 139, Sec. 11.

The issuing of this warrant was a matter of most momentous importance to the condemned. In fact, it was the last legal thread upon which his life depended, and that life, though declared forfeited by the solemn judgment of the court, could not be taken until the warrant was issued by the Governor. Was this act of the Governor judicial in its character, or merely ministerial? If it was at all judicial in its character, then the presence of the accused before the Governor at the time the warrant was issued was just as essential, just as much a matter of right, as the presence of the accused before the Supreme Court of Illinois, when that tribunal fixes the day of execution of a sentence previously pronounced. That body, determining the character of its own act, has decided, printed record, p. 23, that "the mere naming of the day on which the sentence was to be executed was but the exercise of a ministerial power, which at common law was sometimes exercised by the sheriff (1 Chitty's Crim. Law, 5 Am. Ed., p. 782 and 783), and is in this State exercised by the Governor in case of a temporary reprieve."

On this subject, Chitty, in his work on Criminal Law, Vol. 1, pp. 780–787, states the common law procedure as follows:

"In the King's Bench, when judgment of death is given, and the execution is to be performed by the marshal of the court, in whose custody the prisoner is always supposed to continue, the entry is, "*et praeceptum est marescallo, &c., quod faciat executionem periculo incumbente.* *

* * * *

"Formerly, when judgment was given by Commissioners of Oyer and Terminer, the precept of execution was issued to the sheriff, in the names and under the seals of three of the commissioners, one of whom was a quorum; and justices of good delivery were accustomed to award a similar instrument, reciting the judgment and commanding execution to be done, or entering on the record "*et dictum est per curiam hic vice comiti comitatos praedicti, quod faciat executionem periculo incumbente.*

"But it has long been settled that in capital cases the prisoner may be put to death with any writ or precept. And when the proceedings of the court were in Latin, the execution of the prisoner was directed by the words "*sus per col,*" written against his name in a calendar prepared for the purpose. The practice at the present day at the assizes is as follows:

"When all the other public business of the court is terminated, the clerk of the assize makes out in writing four lists of the prisoners, with separate columns containing their crimes, verdicts and sentences, and a blank column in which the judge writes what is his pleasure respecting those capitally convicted, as to be executed, respited or transported. If the sheriff afterwards receives no special order from the judge, he executes the judgment of the law in the usual manner, according to the directions of his calendar.

"In every county this important subject is settled with great deliberation by the judge and clerk of assize, before the former leaves the town where the assizes are holden, but probably in different counties, with some slight variation; as in Lancashire, no calendar is left with the gaoler, but one is sent to the Secretary of State for the Department. But in London, the recorder, after reporting in person to the king the several cases of the prisoners, and receiving his royal pleasure that the law should take its course, issues his warrant to the sheriffs, directing them to perform the execution on the day and at the place appointed. In the Court of King's Bench, if the prisoner be tried at the bar, or brought thither by habeas corpus, a rule is made for the execution, either specifying the time and place, or leaving them to the discretion of the martial. It seems to be the proper mode for the court not to name a day when the execution is to take place in another county, but make a rule to deliver the prisoners to the sheriff of that county where the punishment is to be inflicted.

"In general the execution is ordered, as to its time and place, by the court in which the sentence is passed, in the manner we have seen already. But the Court of King's Bench has not only power to award execution against persons tried or sentenced by its judges, but against attainders in parliament or any other court, on the removal thither of the record of attainder, or a transcript, and the prisoners being brought in by habeas corpus. And therefore it has been resolved that if a peer be convicted of murder, before the High Court of Parliament, and the day appointed by 25 George, 2 C. 37, should elapse, before the execution of the sentence, a new trial may be appointed, either by the Lords themselves, if sitting, or, if their session is concluded, by the King's Bench, on the due removal of the record of attainder.

"The time and place of execution are never part of the judgment itself; and though, in case of murder, the 25 Geo. 2 C. 37, directs the criminal to be executed on the next day but one to that on which he was condemned, yet this act is only directory, and the time of execution does not form a necessary part of the sentence. In other cases a longer time is usually allowed him; at the assizes this is generally left to the discretion of the sheriff, who has no other warrant or direction than the marginal note in the calendar. * * * The court may either appoint the *place* of execution, or they may leave it to the sheriff."

We have quoted thus at length from this standard authority to show what was the rule, if any, at common law, regarding the execution of the death penalty. From this it appears that there was no uniform rule. Different courts, which exercised jurisdiction in capital felonies, were either governed by special statutes regulating their proceedings, or by rules of their own adoption. Three points, pertinent to this discussion, however, are clearly established:

First—That fixing the time and place of execution was not part of the judgment, or sentence.

Second—That frequently no time of execution was fixed by the court, that being left to the discretion of the sheriff.

Third—That the award of a writ of execution was not made in the presence of the prisoner.

Such was substantially the procedure in the courts of England, under the law as it prevailed in that country at the time of the adoption of the constitution, in which this court takes its origin. Many of its formalities have become obsolete, because useless, and most of its punishments have been abandoned because they were barbarous. There is no more reason why the one should be followed in our practice than that the other should be preserved in our penal code.

There is not a State in the Union in which the common law procedure relating to executions is followed, nor is there one in which a more humane and enlightened practice does not prevail. Nor is such procedure followed by the courts of the United States.

In case *The King* v. *Speke*, 3 Salkeld, 358, which was a writ of error to reverse an attainder for high treason, the judgment was reversed because it had not been demanded of the prisoner "what he had to say for himself why judgment should not be given." The court gave as the reason for reversal that this was a necessary question, "because he may have a pardon to plead, or may move in arrest of judgment."

It is a well settled maxim of the law, that when the reason for a rule fails, the rule itself fails. This reason for asking the question is of no force whatever in the Supreme Court of Illinois. Motions in arrest of judgment are made in the trial courts, and the overruling of such motion is usually assigned for error, and is one of the alleged errors upon which the Supreme Court passes, and upon which it passed, in the principle case out of which this proceeding arises.

The reason given of opportunity to plead pardon is wholly without effect here. By section 13, article V, of the constitution of the State of Illinois it is provided:

> "The governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses, subject to such regulations as may be provided by law relative to the manner of applying therefor."

Under a similar provision in the constitution of 1818. the Supreme Court of the State held that the governor could not pardon without conviction.

Ex-parte Birch, 3 Gilman, 134.

Plaintiff in error was convicted in the Criminal Court of Cook county, and even there the plea of pardon could not be interposed till after conviction, because until after judgment of conviction, no pardon could be granted.

After conviction, however, this power of pardon is absolute and supersedes a judgment of conviction for any offense in any court in the State. If therefore a pardon had been granted after the conviction in the Criminal Court of Cook county, no plea of pardon in the Supreme court, even if such plea could there be made, would be necessary or of any avail, for the prisoner having been pardoned, would be at liberty, discharged from the penalty of the crime of which he had been convicted, and no judgment which the Supreme Court might render against him could effect him in the least.

In England where the rule prevailed, a pardon could issue before conviction.

"We believe it to be the law, and such is the practice, in case the defendant be found guilty upon a *capital charge*, for the prisoner to be present, not only at the rendition of the verdict, but that immediately, or at some convenient time soon after, he shall be asked by the court if he has anything to offer, why judgment should not be pronounced against him. And in some early cases it was held that if judgment be given on an indictment without a demand of what the party had to say, it is erroneous. 3 Mod. 265; 8 Id. 26; 12 Id. 51, 92, 312; Ld. Ray. 408; 1 Shann. 131; 1 Sid. 85; Co. Ent. 358; 2 Hale 217; 3 Com. Dig. 513; 2 Hawk P. C. 438."

Grady v. *State*, 11 Ga. 253.

Dyson v. *State*, 26 Miss. 362.

"The ancient practice was for the court to call on the prisoner, if he or she had anything to say why sentence should not be passed. It originated at a time when prisoners were not allowed the benefit of counsel, and when the court was the counsel for the prisoner, so far as to see that he was deprived of no legal right. Besides the benefit of clergy was allowed; and at this stage it was claimed. This is expressly abolished by our penal code. Our penal code prescribes with some minuteness the formula to be observed in the trial of criminal cases. No allusion is made to this ancient ceremony. Prisoners represented by counsel as they are now, lose no right by the omission. One of the reasons assigned in the books for the observance of the practice is that a motion may be made in arrest of judgment. These motions are made daily and always before the prisoner is brought up to be sentenced. Here a new trial was moved for. In order of pleading, this follows a motion in arrest of judgment, and therefore virtually overrules it. All the grounds against the judgment are taken in the motion for a new trial. If she had a pardon, or should even obtain one afterwards, it would be available even under the shadow of the gallows."

Sarah v. *The State*, 28 Ga. 576.

V.

JURISDICTION OF COURTS OF LAST RESORT.

The court of last resort must determine for itself the question of jurisdiction, how it obtains it, and what its proceedings shall be and its determination of these matters must be everywhere final.

"The judgments of a Superior court are never considered void. (7 Bevan 67) and the judges of a Superior Court are never liable personally for acts done in a judicial capacity; this subject was fully considered in the case of *Yates* v. *Lansing*, 5 Johns. 282 and 9 Johns. 394; and the able opinion of Chief Justice Kent on that point was not broken by the argument brought against it, but was sustained by a majority of the judges of the Supreme Court and the Court of Error of the State of New York. If it were not so, this absurdity would result, under our judicial system, that the Inferior Courts would be called on to review and set aside, or disregard the judgments of the Supreme courts; and the proceedings of the inferior courts would pass to the same court for revision and be liable to be vacated or reversed. In this case we are called upon to disregard a judgment once rendered by us, and say that it should not protect the party acting in obedience to its precepts. When courts of a special or limited jurisdiction exceed their powers, their whole proceedings are *coram non judice*, and all commands in such proceedings are trespasses.

But this principal never has been, and cannot be, extended to Superior tribunals, *and especially to those which have ultimate jurisdiction in all cases arising in the other courts*. If the judgment here complained of was either erroneous or irregular, the court, on a proper application, would set it aside; but until set aside, it is to be considered as a regular judgment for every purpose: and it belongs exclusively to this court to examine into and decide upon the regularity of its own proceedings."

Wallbridge v. *Hall*, 3 Verm., 114.

We submit that the reasoning of the court in the above case is simply unanswerable, and practically disposes of this case. That a court of last resort in a State must be the ultimate arbiter on the question of its own jurisdiction, springs as a rule of necessity from the philosophy of our judicial system. It must determine for itself when it has jurisdiction to consider matters brought before it, and at the same time it determines this question finally and unalterably for all other persons. If it cannot do this, then its decisions at once lose all the essentials of final judgments. If it has not jurisdiction, its judgment will be void; but whether or not it has jurisdiction, it alone can decide. A void judgment binds no one; all acting under it are trespassers, and it may be attacked collaterally.

Apply these well-known rules of law to the judgments of the court of last resort by admitting that its jurisdiction may be collaterally questioned, or questioned elsewhere than in that court itself, and all of its power, all of its usefulness as a court of last resort, in short the prime object of its organization, that there shall be an end of litigation, is at once destroyed. This accomplished, and judicial proceedings move forever in a circle.

Let it be supposed that in a civil suit the court of last resort gives judgment in damages and the marshal of the court or the sheriff proceeds to execute the judgment. If the judgment is void it affords no protection to the officer acting under it, and he can be sued in trespass in any court having jurisdiction of actions of trespass. The judgment in this case would in time come before the court of last resort, where it would be compelled to decide what it had already necessarily decided before, namely, that it had jurisdiction or that it had not jurisdiction in the principal case, that its judgment and process, though emanating from the highest court of the State, were no protection to any one, and that the validity of its judgments may be questioned in any inferior court having jurisdiction of the suit in which the question is raised, and such inferior court may determine the jurisdiction of the court of last resort. But the case at bar affords the most striking and conclusive illustration of the fallacy and the pernicious consequences of a rule which would permit the jurisdiction of a court of last resort to be elsewhere questioned, or its judgments held void for want of jurisdiction. It is well known that the Circuit Courts in the State of Illinois, have the same jurisdiction in proceedings in habeas corpus, as have the Circuit Courts of the United States. The petition in the Schwab case might just as well have been filed therein, and such court could in every respect grant the same relief as could the Circuit Court of the United States. The State Circuit Courts are courts of general civil and criminal jurisdiction, and their judgments may be reviewed in the Supreme Court. Now had this proceeding been brought in the State Circuit Court, such court would have been asked to determine, first—

The jurisdiction of the State Supreme Court in the principal case, and, secondly, the validity of its judgment therein.

From this decision an appeal would again lie to the Supreme Court, which would then be called upon to again decide that it had jurisdiction in the original case and that its judgment was valid, or that it had not jurisdiction, that its judgment was void and therefore no protection to any one. If it held what it necessarily held in the first proceeding, that its judgment was valid, such second holding would be no more binding on subordinate tribunals than was its first judgment to the same effect, and might therefore be again questioned in any subordinate court as before. Such a position is not only wholly untenable, but intolerable, and is at war with both our judicial system and the policy of our laws.

On matters of local or State concern, the jurisdiction of the court of last resort of a State, as settled by such court, cannot be elsewhere questioned.

Counsel for appellant and plaintiff in error in the case at bar have cited no decision of this court or of any other court holding that such jurisdiction can be thus questioned. We are aware that in case *Yick Wo* v. *Hopkins*, sheriff, 118 U. S. 356, reversing the decision of the Supreme Court of California, where that court had in a proceeding on habeas corpus, remanded the prisoner, that in its order remanding the case, this court ordered the prisoner discharged; and in case *Wo Lee* v. *Hopkins*, sheriff, heard at the same time on appeal from the decision of the United States Circuit Court for the district of California, refusing to discharge the prisoner, the same order was made by this court, the points being the same as in the *Yick Wo case*. But we submit that those cases do not present the points we are here discussing. In the *Yick Wo case* no point as to the jurisdiction of the Supreme Court of California was raised. There the central question was the validity of the ordinance under which the conviction was had and the judgment of imprisonment rendered. This court held that said ordinance was in violation of the Fourteenth Amendment, and consequently void, but no question of the jurisdiction of the Supreme Court of the State was involved, nor will such question ordinarily be involved when the attack is made upon the law, as in the *Yick Wo case* and when the law is found to be invalid, it follows as a matter of course that the judgment of the trial court was void, but that in no particular could affect the appellate jurisdiction of the Supreme Court. The judgment of the Supreme Court was reversed, but it was the judgment of the police court sentencing the prisoner to imprisonment which was held void. We insist, that in a case like that at bar, the judgment of the highest court of the State, being a court of general appellate jurisdiction, can never be held void for want of jurisdiction. It may be erroneous for irregularity, but never void.

A State court of original jurisdiction, having the parties before it, may consistently, with existing Federal legislation determine cases at law and in equity, arising under the constitution and laws of the United States, or involving rights, dependent upon such constitution or laws.

Upon the State courts, equally with the courts of the Union, rests the obligation to grant, enforce and protect every right granted or secured by the Constitution of the United States and the laws in pursuance thereof, wherever those rights are involved in any suit or proceeding before them.

Robb v. *Connelly*, 111 U. S., 624.

The adjudication of a State court, in the administration of its own laws, will be treated as solemn and binding, subject only to the review by the Supreme Court of the State or of the United States in the regular course of appellate procedure, unless it shall appear that the State law involved in the cause is void by reason of its unconstitutionality, in which case *habeas corpus* will lie, and even then, unless the act was in conflict with the Federal Constitution, such fact would not give the Federal court jurisdiction.

Where the defendant has been regularly indicted, tried and convicted in a State court, and the judgment is merely erroneous, his only remedy is to carry the judgment to the State court of last resort and thence by writ of error to this court. It is only where there is a want of jurisdiction or the judgment is void for other reasons that the writ of *habeas corpus* will lie, and to give the United States Circuit Court jurisdiction, a federal question must be involved.

"It is undoubtedly true, that a Superior Court of general jurisdiction, proceeding within the general scope of its powers, is presumed to act rightly. All intendments of law in such cases are in favor of its acts. It is presumed to have jurisdiction to give the judgments it renders, until the contrary appears. And this presumption embodies jurisdiction not only of the cause or subject matter of the action in which the judgment is given, but of the parties also."

Galpin v. *Page*, 18 Wall., 350,

The Supreme Court of the State of Illinois is a court of general appellate jurisdiction.

Const. Art. 6, Sec. 2.

It is likewise a court of last resort and no presumption will be indulged that it exercises its jurisdiction improperly or irregularly. That is, that it having only appellate jurisdiction in criminal cases, it will not be presumed that in any criminal case it exercised any other than appellate jurisdiction.

"Every presumption will be indulged in favor of the jurisdiction of a court of general jurisdiction.

"County Courts in this State are courts of general jurisdiction in respect to all matters coming within the purview of their jurisdiction, and the same presumptions in favor of their jurisdiction in proceedings for the sale of land by administrators, prevail, as in favor of Circuit Courts."

"Where the record shows, or the court finds, the jurisdictional facts, the record cannot be contradicted or questioned in a collateral proceeding."

Searle v. *Galbraith*, 73 Ill., 269.

"When this court proceeds to give judgment on a writ of error when publication of notice is made as to the defendant in error, it necessarily passes on the question of jurisdiction as to his person, and finds in favor of the same, and this finding is conclusive, unless set aside by this court in a direct application for that purpose."

Fahs v. *Darling*, 82 Ill., 142.

COURT OF LAST RESORT.

"But it must be conceded that the court of dernier resort in every State, decides upon its own jurisdiction and upon the jurisdiction of all the inferior courts in which its appellate power extends. Assuming these propositions as judicial axioms, we will inquire whether the judgment of the Court of Errors for the State of New York, is in violation of the mandate of this court.

"Its language, after expressing the opinion that Charles A. Davis, being consul-general of the King of Saxony, exempted him from being sued in a State Court is, 'therefore it is considered, ordered and adjudged by this court, that the judgment of the said court for the correction of errors be and the same is hereby reversed.'

"The Court of Errors admitted the exemption of Charles A. Davis from being sued in the courts of a State, but added that the fact did not appear in the record of the proceedings of the Supreme Court of New York; and that its own power did not extend to the reversal of any judgment of that court for an error of fact not apparent on the face of the record, though it should be assigned as error in the court for the correction of errors."

Davis v. *Packard et al.*, 8 Pet. 323.

As remarked by Chief Justice Marshall, who delivered the opinion of the court in the above case, the proposition that the court of dernier resort in every State decides upon its own jurisdiction, is a judicial axiom. What such a court decides that it cannot do as a jurisdictional matter, no appellate tribunal will attempt to compel it to do.

And the same must be true as to the nature of the jurisdiction which such court decides that it exercises. When therefore the Supreme Court of the State of Illinois says, that it acts and decides only upon the record made in the court below; that the statutes of the State do not contemplate the presence of the accused in the Supreme Court; that they are not there defending a prosecution, but that they are themselves prosecuting a suit to reverse a judgment by which they were convicted, such adjudication as to the nature of the jurisdiction of the court, will be final and conclusive. Especially will this be true where the record in the original case does not show that a federal question was involved.

"A defendant in a criminal case has no right to be personally present at the hearing of a motion in his behal for a new trial, and his absence will not invalidate a sentence subsequently passed upon him."

Com. v. *Costello*, 121 Mass., 371.

The proceeding in a criminal case in the Supreme Court of Illinois consists merely of an examination of the record of the trial court to ascertain if the accused is entitled to a new trial on account of errors which such record discloses.

The judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government.

On this principle the construction given by this court to the constitution and laws of the United States is received by all as the true construction; and, on the same principle, the construction given by the courts of the several States to the legislative acts of those States is received as true unless they come in conflict with the Constitution, laws or treaties of the United States.

Elmendorf v. *Taylor*, 10 Wheat., 152, 159.
Green v. *Neal's lessee*, 6 Pet., 291.
Shelby v. *Gray*, 11 Wheat., 361.

VI.

HABEAS CORPUS.

Habeas corpus does not lie upon any ground of complaint contained in the petition.

Under section 753 of the Federal Statutes, are stated the cases in which the writ of habeas corpus may be issued and no cause is stated which falls within the complaints of the petition.

The only clause in the section which we believe will be claimed to give the court jurisdiction is the clause allowing the writ when the prisoner "is in custody in violation of the constitution or of a law or treaty of the United States."

Omitting the federal question for the present, this clause only gives jurisdiction where the prisoner is in custody *in* *violation* of the constitution or a law or treaty. This does not give jurisdiction for a mere error of judgment of the court or officer committing the prisoner. An erroneous decision does not render acts done under that decision in violation of the law. If the court had jurisdiction of the person and the subject matter and rendered judgment according to the belief of the court as to the law and the facts, any act done in proper execution of that judgment is done in conformity to law and not in violation of law. Until reversed by a higher court, that judgment stands as full authority to all persons acting under it.

In the case at bar the Criminal Court of Cook County passed judgment sentencing the prisoner to death. The accused sued out of the Supreme Court a writ of error. His taking the case there necessarily gave the court jurisdiction of his person, and the court had jurisdiction of the subject matter under the statute. The accused was in the cutody of the sheriff to be executed and his sentence was commuted by the governor to imprisonment in the penitentiary. If there was error in the proceedings of the court the error must be corrected in that court or on writ of error or appeal to a higher court. Even if the accused had a right to be present in the Supreme Court when judgment was pronounced, and judgment was pronounced in his absence, this does not furnish ground for habeas corpus. In that case it would only be an error of the court which would be corrected on a writ of error.

The warden had good *prima facie* warrant for detaining the prisoner under a conviction and judgment obtained in a court having jurisdiction. The record so shows. If the prisoner desires to question his right beyond this it must be done in proceedings other than habeas corpus.

A certified copy of the record of sentence to imprisonment is sufficient to authorize the detention of the prisoner without any warrant or mittimus.

Ex parte Wilson, 114 U. S. 417.

This court will not discharge on habeas corpus a person imprisoned under a sentence in a criminal case unless the sentence exceeds the jurisdiction of that court, or there is no authority to hold the prisoner under the sentence.

Ex parte Wilson, supra.

The U. S. Supreme Court can not relieve from imprisonment one held under proceedings within the jurisdiction of the court under wherein they were had; it can not review the action of the court in disregarding the plea of once in jeopardy.

Ex parte Bigelow, 113 U. S. 328.

If the court was competent to impose the sentence, irregularities of procedure will not be considered on habeas corpus.

People v. *Walters*, 15 Abb. N. Cas., 461 (N. Y.)
Ex parte Virginia, 100 U. S. 339.

One properly convicted but whose sentence is illegal will not be discharged on habeas corpus but will be remanded to be dealt with according to law.

People v. *Kelley*, 97 N. Y. 212.
People v. *Baker*, 89 N. Y. 460.
Re Petty, 22 Kansas 477.

Mere error in judgment, even when no appeal lies, is not remediable by habeas corpus.

Ex parte Boland, 14 Tex. App., 159.
Ex parte Clarke, 100 U. S., 399.
Re Schenck, 74 N. C., 607.
Ex parte Parks, 93 U. S., 18.
Ex parte Hogan, 25 Ohio St. 426.

The writ will not be issued for defects in matters of form.

O'Malia v. *Wentworth*, 65 Me., 129.

Prisoner can not be taken from the State Court by the United State's Court and discharged simply because he is not guilty.

Ex parte Crouch, 112 U. S., 178.

Where a party is detained under a judgment of a court of general jurisdiction, regularity of proceedings or validity of judgment can not be inquired into on habeas corpus.

Ableman v. *Booth*, 21 How. 506.
Ex parte Watkins, 3 Pet., 193.

Errors of law committeed by the trial court will not be considered on habeas corpus. Only where the proceedings are void will the relief be granted.

Ex parte Parks, 93 U. S., 18.
Ex parte Siebold, 100 U. S., 371.
Ex parte Yarbrough, 110 U. S., 651.

The jurisdiction of this court to review the judgments of the inferior courts of the United States in criminal cases by habeas corpus is limited to the question of the power of the court to try or to commit the prisoner for the act of which he has been convicted.

Ex parte Curtis, 106 U. S., 371.
Ex parte Reed, 100 U. S., 13.
Ex parte Virginia, 100 U. S. 339.
Ex parte Crabb, 106 U. S. 521.

Habeas corpus will not lie in aid of a convicted prisoner sentenced to imprisonment in excess of the statutory period.

In re Graham, 74 Wis., 450.
In re Same, 76 Wis., 366.

Under a writ of habeas corpus the court can only inquire into the jurisdiction, but not into the correctness of the findings on which the conclusion is based.

In re Spencer, 83 Cal., 460.
In re Morris, 40 Fed. R., 824.

Also can not review the constitutionality of the law under which the prisoner is held, if the arrest was under legal process, by a court having jurisdiction of the person and the offense, and the prisoner is in custody of the proper officer by virtue of a provision of law.

Ex parte Boeninghausen, 91 Mo., 301.
Stevens v. *Fuller*, 136 U. S., 468.
In re Lane, 135 U. S , 443.

Errors in law, however gross and numerous, committed by a trial court in matters within its jurisdiction, can only be reviewed by appeal or writ of error. It is only when the trial court is without jurisdiction of the person or the cause and a party is subject to illegal imprisonment in consequence, that the writ of habeas corpus may be invoked. If a State court denies him any right, privilege or immunity which he claims under the Constitution of the United States, he can have his writ of error to the Supreme Court of the United States.

Ex parte Ulrich, 43 Fed. R., 661, and cases cited.

Where a person is arrested on a warrant issued under a State law, and has a hearing before a judge acting within his jurisdiction in accordance with State practice, he cannot be released on habeas corpus as being deprived of his liberty without due process of law.

In re Enslow, 45 Fed. R., 351.

"The habeas corpus, as before intimated, cannot have the effect of a writ of error or certiorari; nor is it designed as a substitute for either. It does not, like them, deal with errors or irregularities which render a proceeding voidable only, but with those radical defects which render it absolutely void."

Hurd on Habeas Corpus, 2nd Ed., p. 327.
Cooley Const. Lim., 4th Ed., p. 430.
Freeman on Judgments, Sections 619, 622.
1 Bish. Crim. Pro., Sec. 1410.
Bouvier's Law Dic. Tit., Habeas Corpus, 14.

The Supreme Court of Connecticut discussed this question at length and so decided, citing many cases in support thereof.

In re Bion, 59 Conn., 372.

That court quoted from the opinion in *Olmsted* v. *Hoyt*, 4 Day, 442: "The judgment of a court of record having jurisdiction, is not void, but stands in force till avoided by reversal, however erroneous it may be, or contrary even to the provisions of the statutes."

The Supreme Court of Missouri went so far as to hold that the question whether a law had been legally adopted could not be inquired into on habeas corpus.

In re Mitchell, 104 Mo., 121.

Habeas corpus is not the proper remedy when the judgment is not void but erroneous.

Ex parte Kellogg, 6 Vt., 509.
Ex parte Greenough, 31 Vt., 379.
Ex parte Liscomb, 60 N. Y., 559.
Ex parte Miranda, 73 Cal., 365.
Ex parte Van Hogan, 25 Ohio St., 426.
Ex parte Underwood, 30 Mich., 502.

Although the court erroneously found that the accused was of an age which would admit imprisonment in the penitentiary, the legality of his imprisonment can only be reviewed on appeal or error—not on habeas corpus.

Ex parte Williams, 87 Cal., 78.

Where petitioner was convicted and sentenced to imprisonment upon a complaint clearly defective, but under a section of the statute declaring an offense of which the court had jurisdiction, it was held the error could not be considered on habeas corpus.

McLaughlin v. *Etchison*, 127 Ind., 474.

Only the question of jurisdiction can be inquired into.

In re Grimsley, 137 U. S., 147.
In re Wood, 140 U. S., 278.
In re Jugiro, 140 U. S., 291.
In re Williams, 87 Cal., 78.

It was held by the Supreme Court of Georgia that while the defendant had the right to be present in the trial court when the verdict was returned, yet the error could not be taken advantage of in a motion in arrest of judgment. A motion to set aside the verdict should have been made. Judgment affirmed.

Nolan v. *State*, 53 Ga., 137.

Where the court exceeds its authority in fixing the punishment after a lawful conviction defendant is not entitled to be discharged on habeas corpus, but the cause will be remanded for such judgment as is authorized by law.

Harrington v. *State*, 87 Ala., 1.

Although a defendant who had pleaded "not guilty," is not present during the impannelling of the jury or trial of the cause, he cannot obtain relief by habeas corpus. Although a gross irregularity, he cannot take advantage of it by habeas corpus. He should petition for a new trial or appeal.

Turney v. *Barr*, 75 Iowa, 758.

A case can be reviewed in habeas corpus only for want of jurisdiction in the trial court. *Daniels* v. *Towers*, 79 Ga., 785; Sennott's case, 146 Mass., 489; Wharton's Crim. Pr. & Pl., 995-6.

That petitioner was convicted without being informed of all his rights or was sentenced too soon after conviction are mere irregularities reviewable on appeal and cannot be inquired into on habeas corpus.

Ex parte Ah Sam, 83 Cal., 620.

So as to conviction without a jury.

Ex parte Miller, 82 Cal., 454.

Imprisonment under a judgment can not be unlawful unless the judgment be an absolute nullity; and it is not a nullity if the court rendering it had jurisdiction, although it should be erroneous.

On habeas corpus a court has no power to discharge a party from custody under a process of a legally constituted court, only for one of the seven causes specified in the statute.

In such a proceeding the court has no power to look beyond the judgment and re-examine the grounds on which it was rendered, and thus practically reverse it.

An execution can only be treated as void when the judgment is void; and that is never the case when the court has jurisdiction of the subject matter and the parties.

Hammond v. *People*, 32 Ill., 466.

Nothing but an entire want of jurisdiction in the State Court to make the order of Dec. 1, 1890, could have justified the Circuit Court in interfering with its proceedings by writ of habeas corpus.

In re Jugiro, 140 U. S., 291.

"It is immaterial that the appellant is the subject of a foreign government. That does not entitle him to exemption from responsibility to the laws of the State into which he may choose to go. The criminal laws of New York make no discrimination against him because of his nativity or race. They accord to him when upon trial for his life or liberty the same rights and privileges that are accorded under like circumstances to native or naturalized citizens of this country."

Id. 297.

A person is not denied the equal protection of the law, nor deprived of liberty without due process of law in violation of the 14th amendment of the Constitution by being tried and sentenced to imprisonment by a judge, who, although appointed by the Governor without authority, is a judge *de facto* of a court *de jure*, by the law of the State as declared by its highest court.

In re Manning, 139 U. S., 504.

In re Duncan, 139 U. S., 448, it will be seen, a petition was filed in the United States Circuit Court of Texas for habeas corpus, to which the sheriff excepted. Writ denied. Appealed. Judgment affirmed.

Civil courts may inquire, under a writ of habeas corpus, into the jurisdiction of the court over the party condemned, but cannot inquire into or correct errors in its proceedings.

In re Grimsley, 137 U. S., 147.

The writ of habeas corpus cannot be used as a writ of error to inquire into all the errors committed by the court below.

In re Wight, 134 U. S., 136.

Not only is the foregoing proposition correct, but it is equally correct that the writ of habeas corpus cannot be used to inquire into any errors committed by the court below, except a usurpation of jurisdiction or power to render the judgment.

If the accused was dissatisfied with the judgment, or with the ground on which it was based, he should have applied for a rehearing, as he might have done, under the rules of the court, and upon satisfactory cause such re-hearing would have been allowed, and the matters complained of, if erroneous, could then have been corrected in that court, or on writ of error, but not in habeas corpus proceedings.

It is not a matter of course that the party is to be discharged even when the authority under which he is held is adjudged illegal.

In re Mason, 8 Mich., 70.
In re King, 28 Cal., 247.
Ex parte Gibson, 31 Id., 619.

"Proceedings defective for irregularity and void for illegality may be reversed upon error or certiorari; but it is the latter defect only which gives the authority to discharge on habeas corpus. An irregularity is defined to be the want of adherence to some prescribed rule or mode of proceeding; and it consists either in omitting to do something that is necessary for the due and orderly conducting of a suit or doing it in an unreasonable time or improper manner. It is the technical term for every defect in the practical proceedings or the mode of conducting an action or defense as distinguishable from defects in pleadings.

"Illegality is predicable for radical defects only, and signifies that which is contrary to the principles of law, as distinguished from mere rules of procedure. It denotes a complete defect in the proceedings. It would be irregular to sentence a man to imprisonment in his absence where the absence was occasioned by the order of the court pronouncing the sentence. It would be illegal to sentence him to imprisonment for a crime which was punishable by a pecuniary fine only.

"Wise rules of procedure established for the regulation of other judicial proceedings are not to be disregarded in that of habeas corpus where they are applicable. One of these rules is that when a record or proceeding is only collaterally brought into question it can not be invalidated for error or irregularity.

"It matters not how flagrant the error is as, when a defendant on suit for vagrancy was not allowed to cross examine the prosecuting witnesses nor to produce witnesses in his own behalf, the court on habeas corpus could not release the prisoner."

Hurd on habeas Corpus, pp. 327, 328.

Where an application was made for a writ of habeas corpus by a person under indictment for murder upon the ground that a former conviction was a bar to all further proceedings, in case *People* v. *Rudoff,* 5 Parker C. R., 77, the writ was refused. The same case well exemplifies two other well known rules of law applicable to this proceeding. It was held on the question of irregularity or erroneous proceedings that "it is not a sufficient cause for discharge on harbeas corpus that the prisoner was not present in court when the trial of the indictment was postponed till the next term of court though it was a right of the prisoner to be present." On the question of the power of the court to try or inquire into the guilt of the prisoner, on habeas corpus, the court said:

"Suppose a person is indicted for the murder of A. B. and committed and subsequently A. B. is produced alive before the officer, may not that person on habeas corpus, on producing A. B. alive before the officer, be acquitted and discharged of the offense as on trial? I answer *no.* A trial in court and an acquittal by jury, or the entry of a *nolle prosequi* by the district attorney by order of the court in which the indictment is pending, are the only methods by which the prisoner can be fully discharged."

In *Ex parte Gibson*, 31 Cal. 619, it was held that the prisoner convicted of murder in the first degree, the penalty fixed for which was death, would not be entitled to his discharge on habeas corpus, when the sentence actually imposed was imprisonment in the penitentiary for ten years.

The case last referred to is instructive, as it embarces most of the points raised by appellant Schwab in the case at the bar.

In the State of California, as in Illinois, a commitment to the penitentiary is made on the certified copy of the judgment of the trial court. In that case, the instrument of commitment was defective, and yet it was held that if it appears on habeas corpus that the commitment to the State prison under which the prisoner is held is void, and if it further appears that there is a valid judgment of imprisonment against the petitioner, rendered by a competent court of criminal jurisdiction, of which a certified copy can be obtained, the court or judge will order the prisoner to be retained until a certified copy of the judgment has been obtained, or until a reasonable time has been allowed for that purpose, and then, if obtained, remand him, thereby clearly announcing the rule that the prisoner would not necessarily be discharged, even if the process on which he was held was so defective as to be void, if it was shown that there was a valid judgment of conviction.

In that case, it was urged that the judgment was void because it did not state the offense of which the prisoner was convicted, and that it therefore furnished no warrant for his detention.

This was held, however, to be only an irregularity, being a matter of recital, and that it did not render the judgment void. That the want of adherence to some prescribed rule or mode of proceeding in conducting the case would, at most, be only such error as would render the judgment voidable, and such errors, however flagrant, can not be inquired into or redressed in a proceeding on habeas corpus; that a prisoner committed on final process will not be discharged on habeas corpus by reason of defects in the judgment, unless the judgment be absolutely void. That to render the judgment void, there must appear something more than an irregularity in the proceedings; there must appear an illegality which is contrary to the *principles* of law, as distinguishable from the *modes of procedure*.

That while under the statute and practice of California, it should appear in the judgment that all the acts required to be done up to that stage have been petformed, yet it does not follow that the omission of some or any of them will render the judgment void. In conclusion the court says: "In England an omission to state, that the defendant was asked if he had any legal cause to show against the judgment, would be fatal on writ of error. In the United States this question has been decided in various ways. Some courts holding that it would be error and others that it would not, even in capital offenses. *But I am unable to find a single case in England or America, where such an omission has been held sufficient to render the judgment absolutely void.*"

We will not contend that the decision of one State Court should be regarded as conclusive of this question, but the decision referred to covers so many of the points raised in the case at bar and discusses and decides them so clearly on the line of principle, and in accordance with the rule as held generally in this country, that we felt it proper to refer to it at length.

VII.

NO FEDERAL QUESTION IS PRESENTED IN THIS RECORD GIVING JURISDICTION TO A UNITED STATES COURT.

The averment that the prisoner is held in violation of the constitution and laws of the United States is not proof of that fact, nor does the allegation give the court jurisdiction, nor is its truth admitted by the demurrer. It is only a conclusion of the pleader on a question of law.

The State has exclusive jurisdiction of the enforcement of the Criminal Code of the State and the punishment of persons convicted of murder, and there is nothing in the constitution or laws of the United States prescribing the method to be pursued in the commutation of a sentence of death or in committing to the penitentiary a convicted person whose punishment has been commuted by the Governor to imprisonment in the penitentiary. Neither is there anything prescribing the character of the paper title which the warden shall have.

The petitioner had been sentenced to death. The sheriff held him in custody and had the transcript of the judgment of the Criminal Court of Cook county and of the judgment of the Supreme Court affirming the former judgment and fixing the day for the execution.

Where imprisonment in the penitentiary is the punishment, a transcript of the judgment is the sheriff's authority for conveying the prisoner to the penitentiary. Ill. Stat., Ch. 38, Div. XIV, Sec. 18. The sheriff had the commutation of the Governor commuting the sentence to imprisonment. The sheriff could not do otherwise than convey the prisoner to the penitentiary. Though perhaps unnecessary, the warden had authority direct from the Governor to receive and hold the prisoner. Whether the State laws would require more there is noting in this violative of the constitution or laws of the United States.

Averment that petitioner is detained in violation of the constitution and laws of the United States, and that the District Court had no jurisdiction is only a conclusion of law.

Ex parte Cuddy, 131 U. S., 280.

The Federal Courts have no jurisdiction to grant a habeas corpus upon petition alleging that the prisoner is held under the capias of a State Court issued upon a judgment that has been vacated.

In re Shaner, 39 Fed. R., 869.

In a writ of error to the Supreme Court of the State this Court is limited to the question, whether the plaintiff in error has been denied any right in violation of the constitution, laws or treaties of the United States.

Yick Wo v. *Hopkins*, 118 U. S., 356.

Where, upon writ of error from the Supreme Court of the United States to the Supreme Court of Maryland, the plaintiff in error urged that the statute law was invalid because it contained no provision for an oath on which to found the warrant of arrest of the vessel which was seized for a violation of law by its owner and officers, the court held the objection could not be here maintained.

"So far as it rests on the constitution of the State, the objection is not examinable here under the 25th section of the judiciary act. If rested on that clause in the constitution of the United States which prohibits the issuing of a warrant but on probable cause supported by oath, the answer is that this restrains the issue of warrants only under the laws of the United States, and has no application to State process. *Barron* v. *Mayor etc. of Baltimore*, 7 Pet., 243; *Lessee of Livingstone* v. *Moore et al.*, 7 Pet., 469; *Fox* v. *Ohio*, 5 How., 410."

Smith v. *Maryland*, 18 How., 71.

Where the writ of habeas corpus is sought from the U. S. Court against the sheriff of the State Court by one imprisoned for the violation of a State law the petitioner must clearly show an irreconcilable antagonism between the federal law and the State law under which he is in custody.

In re Hoover, 30 Fed. R., 51.

The Federal Courts have no power to discharge a person held under a State statute on the ground that the State statute violates the State Constitution.

Re Brosnahan, 18 Fed. R., 62.

S. C. 4 McCrary, C. Ct., 1.

Yick Wo v. *Hopkins*, 118 U. S., 356.

NO FEDERAL QUESTION WAS RAISED OR DECIDED IN THE STATE COURT.

As heretofore remarked, in the original case of *Spies et al.* v. *The People of the State of Illinois*, out of which this case arises, 122 Ill., 1, 123 U. S., 131, no federal question was either raised or decided in the State court. Had such question been raised, it would have been decided on error from this court.

Not having been so raised and decided, it cannot now be raised for the first time in a collateral proceeding. If such question had been raised, and decided adversely to appellant, and he had neglected to prosecute a writ of error, he would be bound by the judgment, even though erroneous.

Final judgment of a State court coming within the conditions of Section 25 of the Judiciary act, or Section 2 of the Amendatory act, may be re-examined and reversed or affirmed in the Supreme Court on writ of error.

Rev. Stat., Sec. 709.

Cases in the State courts, involving questions arising under the Constitution, laws of the United States, or treaties of the National government, are of frequent occurrence. In such case, if the party to whom the decision of the highest court of the State is adverse, has set up the right, title, privilege or immunity in that court, after the determination of the cause in such court, he may sue out a writ of error and remove the cause into this court for re-examination. But the existence of a federal question does not destroy the jurisdiction of the State court over the case, nor does the raising of such question for determination by said court in any manner affect the right of that court to render judgment, or the validity of such judgment when rendered. And if the party fails to prosecute his writ of error for re.examination by this court, the judgment of the State court cannot be collaterally questioned.

COMMON LAW.

It is well settled that the Federal courts have no jurisdiction of common law offenses, unless such jurisdiction is conferred by Congressional action. Such jurisdiction would, in case it were conferred, become statutory, rather than common law.

Congress has nowhere attempted to confer on United States courts jurisdiction to review the action of State courts, on the ground that such action is in violation of common law procedure. Therefore, it follows that before the Circuit Court could issue the writ of habeas corpus in this case, it must appear that the petitioner was restrained of his liberty, not in violation of a common law right, but in violation of a Federal guaranty. If the restraint is in violation of a constitutional guaranty, or of a Federal statute, then the jurisdiction of the Federal court must appear in the Constitution or Federal statutes; but if the restraint is in violation of a common law right, the jurisdiction to administer the remedy is in the State court.

By the second section of the third article of the Constitution, the judicial power of the National government is declared to "extend to all cases in law and equity arising under the Constitution, the law of the United States, and treaties made, or which shall be made under their authority;" but it extends no further than this, and wherever the jurisdiction of a Federal court is asserted, the right of such assertion must be found either in the Constitution, an act of Congress, or a treaty.

Federal courts have no common law jurisdiction in criminal cases, nor can such courts proceed to try and punish any offender, except where authorized by an act of Congress, passed in pursuance of the Constitution.

State of Penn. v. *Wheeling Bridge Co.*, 13 How., 518, 563; *United States* v. *Worrell*, 2 Dall., 384, 393; Cooley Const. Lim. (4th Ed.), 26; *ex parte Bollman*, 4 Cranch, 75, 98.

It is clear that there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent States; each of which may have its own local usages, customs and common law. There is no principle which pervades the Union and has the authority of law, that is not embodied in the constitution or laws of the Union. The common law could be made a part of our federal system only by legislative adoption.

Wheaton v. *Peterson*, 8 Pet. 591, 658.

VIII.

FOURTEENTH AMENDMENT.

The fourteenth amendment to the constitution was not designed to interfere with the power of a State to protect the lives, liberty and property of its citizens, nor with the exercise of that power in the adjudication of the courts of the State in administering the process provided by its laws. Nor does it take from the States any of those just powers of government which in the original adoption of the constitution were reserved to the States respectively.

Before the adoption of the constitution, each State conferred at its own will upon its judiciary such powers, as seemed best calculated to subserve justice, and promote the public welfare, and in doing so, regulated its own judicial procedure, and such regulation was final, without the right of review anywhere. It is true such regulation was in accordance with the principles and procedure of the common law, not because any power higher than the State could be appealed to for the enforcement of the same, but for the reason that such principles and procedure had prevailed in the colonies from which the States were created. The right of the States to alter or abolish such procedure was inherent and absolute and cannot be questioned. This right, so far as it pertained to the matters coming within the domain and purposes of local or State government, the States did not surrender at the adoption of the constitution.

If this doctrine needed support it would be found in the limitation as to the powers of the federal judiciary imposed by the constitution, which extends such power only to "all cases, in law and equity arising under this constitution, the laws of the United States, and treaties made or which shall be made under this authority." Neither the constitution, the laws of the United States, nor national treaties contemplate the regulation of procedure in State Courts or the regulation of local order within the States. Nor was it the purpose of the Fourteenth Amendment to extend the power of the Federal Judiciary to review such matters, "by taking from the States any of those just powers of government, which in the original adoption of the Constitution were reserved to the States respectively."

Certainly it was never contemplated by that amendment that the power of the Federal Judiciary should be so extended that, in one case, it may order the highest court of the State to amend its record, to the end that by such amendment, a question of Federal cognizance would be created, and, in the other case, it may determine the nature of the jurisdiction which the highest court of the State may exercise, and the manner of procedure that it may adopt and so that the judgment of a State Court having jurisdiction in accordance with the State Statute, shall be held void, for an alleged want of a formality, which is properly reviewable on error.

The Fielden case here pending asks this extension for the former purpose, and the Schwab case for the latter. The government was not revolutionized by the Fourteenth Amendment, nor were the powers of State Courts in adjudication of matters lawfully within their cognizance impaired.

In the opening of the chapter devoted to the "14th Amendment,' 2. Story on Const., Chap. 47, the distinguished editor says: "The Fourteenth Article of the Amendments, to which we now direct our attention, must find its justification in the great change brought about by the civil war and in the disorder following resulting therefrom, and which seemed to render new precautions and new securities important, if not imperative."

After reciting that a brave, powerful but unsuccessful army had been broken up and its members remanded to civil life; many of them reduced by the war from affluence to poverty; they found labor disorganized, their own cherished hopes and prospects impaired; the social system changed and its prejudices rudely violated; and as the result of military successes which their former slaves had assisted in achieving, these same slaves elevated to a condition of theoretical equality before the law with themselves; and now rejoicing over the very events which worked discomfiture and disaster to their late masters, he says:

> "Yet in the hands of the latter was still the political authority; in numbers they predominated; they were superior in intelligence; the colored people were still in great measure dependent upon them for subsistence and it was impossible to expect that the relations between the two classes were to be adjusted to the new circumstances without the feelings and passions which war and emancipation had engendered, finding occasional expression in acts of disorder, injustice and violence. The disbandonment of a great army is always a circumstance of no little solicitude and danger, but it is doubly so when it must be settled among a people who have been elevated from slavery to manhood by its defeat, but who, nevertheless,

being the weaker in numbers and resources, must be more or less dependent on the defeated party for just and kind treatment, and even for the means of subsistence."

The history of the events leading up to and giving rise to this amendment are too recent to need recounting. But in order to ascertain its purpose, intent and scope, it is proper to consider all its provisions, and from such examination, we maintain that it is evident that it arose out of the conditions resulting from the civil war, and related to them alone.

The second section changes the basis of congressional representation from that fixed in clause 3, section 2, Art. 1, of the Constitution. By the latter, the slave was reckoned as three-fifths of a person. By the amendment, the freedman was counted as a man, and to enforce his civil rights representation was reduced when the right to vote was denied him.

The third section imposed civil disabilities for participation in the Rebellion. The fourth section made inviolable the public debt incurred on account of the war, and prevented the assuming by the nation of any debt incurred in aid of the rebellion. So that the learned author, from whom we have just quoted, was abundantly justified in the conclusion at which he arrived, that: "To Congress and the majority of the people it seemed clear that these circumstances demanded additional securities by way of constitutional amendment, not only for the purpose of protecting the newly conferred rights and liberties of the

African race, but also to secure against possible dangers the credit of the states and the honor of the general government."

As we understand it, the clause of this article of the amendment claimed to be pertinent to this cause, is that part of the first paragraph of section one, declaring, "Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the general protection of the laws."

This part of the amendment had the same origin and was designed only as part of the scheme by which the results of the war, then supposed to be in jeopardy, should be protected by constitutional guarantees. And while practically this same declaration of guaranty was contained in the Constitution of nearly every State, it was not deemed by Congress sufficient for the conditions then existing. Nor can it be for a moment contended that those conditions in the least particular affected the rights or safety of foreigners, resident here or transient. Speaking of these State guarantees, the learned author, above referred to says:

> "Yet, under the altered circumstances of the country, it was not now thought to be sufficient. The difficulty was, that certain classes of persons in some of the States had not been within its protection, either because held as property, and, as such, subject in great degree to the arbitrary domination of masters, or because, belonging to a prescribed race, they occupied an anomalous position, and were conceded but an imperfect measure of right and privilege. * * * Under the influence of such ideas, was there not reason to fear that legislation would be enacted, the

actual purpose of which might be, whether avowed or not, or the effect even if not designed, to keep the colored race for a time at least in that condition of pupilage and dependence for which only, as many believed and declared, they were adapted either by nature or acquirements?

"It was not to be denied,—indeed it was notorious—that such a fear prevailed; and that it was not wholly without reason was made apparent in the legislation adopted in some of the States, which undertook to establish peculiar regulations of labor and apprenticeship for the colored people. These regulations assumed the unfitness of that people to act independently and freely on their own behalf, and the consequent necessity of legislating for them as dependent persons.

"If the public sentiment in any of the States would demand and justify such legislation as being necessary, was there not reason to expect that it would be sustained by the judicial tribunals also? And if sustained and enforced would not the probable, nay, the inevitable, results be to perpetuate the degradation of this people, or at least, to interpose serious obstacles to any efforts which might be made to elevate them to a condition of equality with their fellow beings?

It is necessary to discuss here the meaning of the expression "due process of law," which seems to be the clause of this amendment, under which in the habeas corpus case, appellant Schwab seeks to raise a federal question.

After discussing the origin and meaning of the phrase, the learned author from whom we have been quoting, 2 Story on Const., sec. 1944, concludes that it is synonymous with "the law of the land, and by the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society."

Referring to the effect of this amendment on the powers of the States, he says. (sec. 1947):

> "The States in the enforcement of their own laws for the preservation of peace and order, may dispense with the grand jury, if the legislature shall so provide: and they may make all state offenses triable by a single judge, instead of by jury, if that mode of trial shall be thought most politic or conducive to justice. And no more under the fourteenth article than previously can the federal government interfere with the mode prescribed for the trial of State offenses; whatever is established will be due process of law, so that it be general and impartial in operation, and disregard no provisions of Federal or State Constitutions."

By a peculiar express provision of this amendment, Congress is given power to enforce it by appropriate legislation. That such power existed without this provision is necessarily true, from the very nature of constitutional government, but the provision will still not be regarded as meaningless.

First, it was intended to emphasize the adoption of the amendment, and as especial notice of the newly conferred federal guarantees; and, second, it was a command to Congress to so legislate as to prevent the ills which seemed to threaten, and which this amendment was intended to obviate. In accordance with this intention, Congress, on April 20, 1871, passed an act to enforce the provisions of this article. An examination of this act will show that it relates wholly to the results of the war, and was designed for the better protection of the freedmen. No section or clause of it indicates that Congress, in attempting to enforce the amendment, had in mind any such matters as are involved in the cases at bar, or that it was designed to interfere with the administration of State laws providing against State offenses, except in cases where those laws themselves, or the courts in administering, deprived persons within the jurisdiction of the State of the equal protection of the laws.

This act is penal in its character, and is the lamp by which the protective provisions of the amendment are to be read. It was legislation cotemporaneous with the amendment, and every penal provision is directed against offenses prevalent against the rights of the freedmen. It may be regarded as a cotemporaneous interpretation of the amendment; and there is a rule of construction relating to legislative intent, that when the legislature has had under consideration a subject, it will be deemed to have exhausted the legislative intention in that behalf, and such rule will be followed until the legislature takes further action thereon. This act is, therefore, a legislative construction of the amendment, and as such is entitled to great weight. And, adverting to the scope of the first clause of section one of the amendment, the same learned author, Sec. 1960, says: "It is to be observed first, that this clause, of its own force, neither confers rights nor gives privileges; its sole office is to insure impartial legal protection to such as under the laws may exist." And concluding the chapter referring to the provisions of this amendment, Sec. 1968, he says: "Important as they unquestionably are, it is, nevertheless, to be observed that they have not been agreed upon for the purpose of enlarging the sphere of the powers of the general government, or of taking from the States any of those just powers of government which in the original adoption of the Constitution were 'reserved to the States respectively.' "

The existing division of sovereignty which had been found equal to the preservation of our liberties, not only in times of peace and general harmony, but in the trial of a most desperate civil strife, is not disturbed by it. It does not prohibit the States from exercising certain powers upon their citizens; but unless we are wholly mistaken in our assertion that they are not powers which the people, in framing free republican government, are accustomed to entrust to their rulers, it will be perceived that the provisions of this article are not to be regarded as limitations upon powers, but rather as precautions against possible usurpation and tyranny. The things forbidden were already forbidden by the fundamental principles of the social compact, and beyond the sphere of the legislative authority alike of the states and of the nation. It still remains true, as before, that the exercise of the local sovereignty is left with the states; and it is only when essential principles of republican government are, in some State, as regards some portion of the people, purposely disregarded, or by connivance of the authorities or otherwise, suffered to be set aside by unlawful violence; when, in other words, the State purposely abuses its functions in the oppression of individuals, or systematically refuses or neglects to employ its functions in giving protection to any class of its citizens, that the Fourteenth Amendment to the Constitution of that common government which, "for general purposes," is "over the whole," interposes its command to prevent the wrong.

This article has not been agreed upon in order to centralize power, but to preclude such a possible abuse of power as might result from prejudice or other unworthy motive. The States, in adopting it, have not struck blindly and fatally at their reserved powers; they have rather given security that in certain important particulars they will not pervert or abuse them.

The primary functions of the State are the protection of rights, the prevention of wrongs, and the punishment of crime. They belong to the domain of social or local order, in which the State is supreme, except where its power is specially limited.

But the construction of the Fourteenth amendment by the light of the historic causes leading to its adoption, was approved by the court in *The Slaughter House cases*, 16th Wall. 36. After reviewing the events leading up to the adoption of the three late amendments, the court say:

> "To withdraw the mind from this grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this government a declaration designed to establish the freedom of four millions of slaves, and with a microscopic search endeavor to find in it a reference to servitudes which may have been attached to property in certain localities, requires an effort, to say the least of it. * * * * *
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> "We repeat then, in the light of this recapitulation of events almost too sacred to be called history, but which are familiar with us all, and on the most casual examination of the language of those amendments, no one can fail

to be impressed with the one prevailing purpose found in them all, lying at the foundation of each, and without which none of them would have been suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppression of those who had formerly exercised unlimited dominion over him. It is true that only the Fifteenth amendment in terms mentions the negro by speaking of his color and his slavery; but it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them, as the Fifteenth. * * * *

"But what we do say, and what we wish to have understood, is, that in any fair and just construction of any section or phrase of these amendments, it is necessary to look always to the purpose which we have said was the prevailing spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the constitution, until that purpose was supposed to be accomplished as far as constitutional law can accomplish it."

Referring to that phrase of section 1 of the Fourteenth amendment relating to due process of law, which is invoked in the cases at bar, the court say:

"The first of these paragraphs has been in the Federal Constitution since the adoption of the Fifth amendment as a restraint upon Federal power, it is also to be found in some form of expression in the constitutions of nearly all the states as a restraint upon the power of the states.

"The law then has practically been the same as it now is during the existence of ths government, except so far as the present amendment may place the restraining power over the states in this matter in the hands of the Federal Government."

Concerning the last clause of section 1, forbidding any state to deny to any person within its jurisdiction, the equal protection of the law, while we do not see how that provision can be fairly, even by argument involved in these cases, yet we contend that the exposition given in the case referred to is entirely conclusive here.

"In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause. The existence of laws, in the states where the newly emancipated negroes resided, which discriminated with gross injustice and hardships against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden. But if the states did not conform their laws to its requirements then by the fifth section of the article, Congress was authorized to enforce it by suitable legislation. We doubt very much whether any action of a state, not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency that a strong case would be necessary for its application to any other. But as it is a state that is to be dealt with, and not alone the validity of its laws we may safely leave that matter until Congress shall have exercised its power, or some case of state oppression, by denial of equal justice in its courts, shall demand a decision at our hands.

"But however pervading this sentiment, and however it may have contributed to the adoption of the amendments we have been considering, we do not see in those amendments any purpose to disturb the main features of the general system."

"The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities may and do exist in these respects in different states. One may have the common law and trial by jury; another the civil law and trial by court. But like diversities may also exist in different parts of the same state. The states frame their laws and organize their courts with some regard to local peculiarities and special needs, and this violates no constitutional requirement. All that one can demand under the last clause of section 1 of the Fourteenth Amendment is, agreed upon for the purpose of enlarging the sphere of the powers of the general government, or of taking from the States any of those just powers of government which in the original adoption of the Constitution were 'reserved to the States respectively.' "

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Missouri v. *Lewis*, 101 U. S. 22.

In case *Hurtado* v. *California*, 110 U. S. 516, error to the Supreme Court of California, it was urged that the judgment of conviction was void because the constitution of the State and the statute under which plaintiff in error was convicted, permitted prosecutions for felonies, on information, that such proceeding was not "due process of law," and was therefore, repugnant to the Fourteenth Amendment.

In considering the adaptability of the common law to changing and improved conditions of civilization, the late Justice Matthews who wrote the learned opinion in that case, says:

"The constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues. And while we take just pride in the principles and institutions of the common law we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. Due process of law, in spite of the absolutism of continental governments, is not alien to that code which survives the Roman Empire as the foundation of modern civilization in Europe and which has given us that fundamental maxim of distributive justice, *Suum cuique tribuere*.

"There is nothing in Magna Charta, rightly construed as a broad charter of public right and law which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to derive its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted."

And speaking of the broad and general Common Law maxims of liberty and justice, he says:

"But they must be held to guarantee not particular forms of procedure, but the very substance of individual rights to life, liberty and property. * * * * * It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law."

"A person has no property, no vested interest in any rule of the Common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without some process; but the law itself, as a rule of conduct, may be changed at the will or even at the whim of the legislature, unless prevented by constitutional limitations. Indeed the great office of statutes is to remedy defects in the common law, as they are developed, and to adapt it to the changes of time and circumstances."

Munn v. *Illinois*, 94 U. S. 113.

"A State cannot deprive a person of his property without due process of law. This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. Due process of law, is process according to the law of the land. This process in the States is regulated by the law of the State."

Walker v. *Sauvinet*, 92 U. S. 90.

"It is not possible to hold that a party has, without due process of law, been deprived of his property, when as regards the issues affecting it, he has by the laws of the State a fair trial in a court of justice, according to the modes of proceeding applicable to such a case."

Davidson v. *New Orleans*, 96 U. S. 97.

Missouri v. *Lewis*, 101 U. S. 22.
Ex parte Wall, 107 U. S. 288.

That these parties were tried in a court of competent jurisdiction, the Criminal Court of Cook county, is shown by the records. (Fielden, Rec. 4; Schwab, Rec. pp. 9, 10, "Ex. C."; pp. 17, 18, "Ex. D.") and is admitted in brief of counsel, p. 1, and all that could be urged against the correctness of said trial, so far as it was thought would come within the cognizance of this court, was urged in

Spies v. *Illinois*, 123 U. S. 131.

A State can not be deemed guilty of a violation of its obligations under the Constitution of the United States, because of a decision, even if erroneous, of its highest court while acting within its jurisdiction.

When a person accused of crime within a State is subjected, like all other persons in the State, to the law in its regular course of administration in courts of justice, the judgment so arrived at can not be held to be such an unrestrained and arbitrary exercise of power as to be utterly void.

In re Converse, 137 U. S. 624.

IX.

The pardoning power is an inherent attribute of sovereignty, and unless regulated by law, the manner in which it is exercised is within Executive discretion.

There must in every form of government be an ultimate executive power vested somewhere. In each of the States of the Union that power is vested in the Governor, who, as Chief Executive, is the representative of the sovereignty of the people. While his powers are usually limited by constitutional provisions, it is unquestionable that in addition to the powers thus specifically conferred, he possesses many of the powers usually exercised by the executive head of the state in all forms of government. The power of punishment for crime, which every government exercises, necessarily implies the existence of a power to ameliorate punishment. This latter power is usually exercised by pardon, commutation or reprieve. It may be well claimed that the power of pardon, if not denied by constitution or legal provision, would exist, even though not specifically conferred.

In the State of Illinois, the right to its exercise is conferred upon the Governor by constitutional provision. Const., Art. V, Sec. 13. The manner of its exercise is neither prescribed, regulated or limited by the Constitution or by law, except that by the former it cannot be exercised until after conviction, and the manner of applying therefore may be regulated by law. This regulation, however, does not extend to the *exercise* of the power, which must, therefore, be of necessity not only discretionary but largely arbitrary. No formality is required by law for a pardon or commutation, and we maintain that any form in which the Executive will is so plainly and unmistakably made known to the officer having the prisoner in custody that he accepts it and acts upon it, is sufficient justification for such action.

In this case, the sheriff of Cook county had the prisoner properly in his custody, by virtue of the judgment of the Criminal Court of Cook county, "Ex. D." The commutation, "Ex. A," delivered to the sheriff was sufficient authority to that officer to justify him in withholding the punishment fixed by the judgment, and substituting for it the one named in the commutation, and he so accepted and acted upon it. The paper, "Ex. B," sent to the warden by the Governor, the commutation, "Ex. A," and the certified copy of the judgment of the Criminal Court of Cook county, "Ex. D," delivered to him by the sheriff with the prisoner, all taken together, constitute ample authority for the latter's detention by the warden.

To the commutation, "Ex. A," and the communication from the Governor to the warden, "Ex. B," it is objected that they are not duly formal. To this we answer, that no formality is necessary. The material matter is the rightful exercise of the power by the Governor, and as no specific manner of exercising that power is prescribed by law, formality is wholly immaterial.

To the suggestion that none of the papers constituting the claim of authority by which the warden holds the petitioner were in the name of the People of the State of Illinois, as provided by the Constitution of the State, we answer that neither of said papers is "process" within the meaning of that provision. The legislature has provided that a certified copy of the judgment of conviction shall be the sheriff's authority for conveying a convict to the penitentiary and delivering him to the warden thereof.

Crim. Code, Div. XIV, Sec. 18.

There is not to-day in the penitentiary in the State of Illinois a convict committed otherwise than in accordance with this provision. But we insist that this is a matter of State regulation, and that it involves no Federal question.

The petition shows ample authority on the part of the warden for the detention of the petitioner.

It shows a judgment of conviction of the crime of murder, in the Criminal Court of Cook county, "Ex. D.", and this judgment is not attacked in the petition, nor is any objection made to its regularity.

The commutation referred to the conviction at the June term, A. D 1886, of the Criminal Court of Cook county of the crime of murder and the sentence therefor to be hanged, and commutes the punishment imposed by the sentence to imprisonment in the penitentiary for life. So the communication to the warden recites:

> "I have this day commuted the sentence of Samuel Fielden and Michael Schwab, under the sentence at the June term, A. D. 1887, of the Criminal Court of Cook county, to imprisonment of the said Samuel Fielden and Michael Schwab in the penitentiary for life."—Rec., pp. 8 and 9.

No reference whatever is made to the judgment of the Supreme Court. The commutation does not act upon that judgment, nor is there anything in it upon which the commutation could operate. The Governor is not controlled in any way by the action of the Supreme Court upon the writ of error. His action in pardoning the offender or commuting the sentence could have no effect on the action of that court even though the case was pending in that court at the time the Governor granted his commutation. Under the Constitution, the Governor could not pardon or commute the punishment until after conviction. Conviction takes place in the trial court. The judgment in the Supreme Court neither adds to nor takes anything from that conviction. The Governor may commute at any time after the judgment in the trial court and need make no inquiry as to any writ of error in the Supreme Court. The punishment is imposed by the trial court, and not by the Supreme Court. The Governor commutes that punishment. The only complaint made in the petition for writ of habeas corpus against any judgment is against the judgment of the Supreme Court. Now, the commitment and holding in custody of the petitioner, appellant herein, do not depend in the least upon that judgment. So for as the commutation by the Governor is concerned it gives no intimation that such a judgment ever existed. The sheriff held the prisoner under the judgment of conviction in the Criminal Court of Cook county and sentence of death therein. The Governor commuted that punishment to imprisonment and under the judgment in the Criminal Court and the commutation of the Governor, the prisoner was conveyed to and now is detained in the penitentiary. The judgment of the Supreme Court may be wholly ignored and there remains ample authority for the detention of the prisoner. No complaint was made in the petition and court below against the sufficiency of the judgment in the Criminal Court and the objection made to it cannot be raised for the first time in this court.

The record, Ex. "D," shows that the prisoners were present at the time sentence was passed upon them in the Criminal Court of Cook county. To reverse the judgment of conviction, a writ of error was prosecuted in the Supreme Court of the State and all objections to the judgment, as well as to the proceedings in detail, upon which it was based, were ably and vigorously presented, and the court found that in the same there was no error.

To reverse the judgment of the Supreme Court a writ of error was applied for in this court and denied. By these proceedings appellant is absolutely concluded, and we insist that the proceedings in the cause resulting in his conviction can not be again reviewed in the manner here sought to be done. The prisoner has once been the subject of executive clemency, which, though it saved his life, he now seeks to have this court set at nought.

REPLY TO SUGGESTIONS OF COUNSEL FOR APPELLANT AND PLAINTIFF IN ERROR ON MISCELLANEOUS POINTS.

a. In reply no the suggestion of counsel that section 15, chapter 37 of the statutes of Illinois gives the court power to amend or change its judgment at any time within six months after judgment, we submit that that section does not authorize an amendment to or change of the judgment; it only authorizes a correction of the record of the judgment to conform to the judgment actually rendered by the court, if the record has been erroneously made. The correction is in the *entry* of the judgment and not in the judgment itself. If the judgment itself is to be changed, *i. e.*, what the court actually decided, that correction must be reached by petition for rehearing only. Moreover, that section relates to the action of the judges in vacation and not to the action of the court in term time.

In the Fielden case the court in holding it had no jurisdiction, necessarily held that this section did not apply to the case, and the construction of that court upon the statute and its own powers is conclusive. None of the amendments in any of the cases cited by opposing counsel rely upon or relate to the section quoted, for their support.

b. The allegation that amendments to or changes of the judgment after the adjournment for the term are allowed by the Supreme Court to other litigants upon motion and without petition for rehearing according to the rules of the court, is without foundation in law or fact. The cases cited relate to amendments in the Circuit Courts, and even these do not permit the altering of a *judgment* by that court after adjournment of the term at which it was rendered. They only support the action of the court in correcting errors of the clerk or entries contrary to the actual directions of the court, or corrections in support of the judgment—and even then there must be something in the record to correct by. No case authorizes a departure from what the court actually decided.

And in the case of *Dougherty* v. *People*, 118, Ill. 160, it was sought to amend the record in support of the judgment, after the adjournment of the term at which judgment was rendered, and after expiration of the time allowed for filing bill of exceptions, by inserting in the bill of exceptions proof of venue, which it was shown by witnesses and by the judge who tried the case, was proven upon the trial. But there was no record or memorandum to make the amendment by and although the Circuit Court allowed it, the Supreme Court held such action erroneous and reversed the judgment for want of proper record of proof of venue.

c. Counsel say on page 12 of their brief, that it is admitted that Schwab was sentenced to death by the Supreme Court when he was not present, and it appears from the record that neither in the Supreme Court nor the Criminal Court was Fielden or Schwab asked what if any thing they had to say why sentence, etc. The first proposition is not admitted and has been fully answered; the second, is not shown by the record. The record brought up only shows the judgment. The record supporting the judgment in either court is left wholly to be surmised in this court, and this court can only presume that the record supports the judgments. Nothing whatever is shown by the record brought here as to the allocution except the recital in the judgment of the Criminal Court of Cook county, "and now neither the said defendant nor his counsel for him saying anything further why the judgment of the court should not be pronounced," etc. The record brought up does not purport to be the entire record of the cause, and the court will not indulge a presumption to defeat the judgment. If in order to support the judgment the court should hold that it is necessary the record should show the allocution, this recital will be taken as showing that fact, or it will be presumed that it is shown in some other part of the record; but this is a matter of State practice determined by the laws of the State and not a matter relating to federal jurisdiction. But the judgment of the Criminal Court of Cook county is not attacked in this proceeding. In the motion in the Fielden case it is not considered or referred to nor is any reference made to it in the petition for a writ of habeas corpus except as one of the claims of the warden under which petitioner is held. Its validity is not there attacked and the question of allocution in the Criminal Court of Cook county cannot now be raised for the first time and on a partial record, nor can it be raised in the United States Court.

It is a matter of State law, and the Illinois court has held that a failure to ask the accused in a capital case if he has anything further to say why judgment should not be pronounced, etc., is not fatal, even on writ of error.

Gannon v. *People*, 127 Ill. 507.

d. Counsel suggest that "Exhibit A" is the only authority for the warden to detain the prisoner Schwab, and that it is no authority because it is not directed to the warden. The statutes of Illinois do not require any commitment paper addressed to the warden and no prisoner is committed by the courts of the State of Illinois under any mittimus addressed to the warden.

Exhibit "A" was not addressed to the warden for the reason that the prisoner was not then in the warden's custody, and if it had been addressed and delivered to the warden it would have been wholly inoperative. Exhibit "B" authorizes the warden to receive and hold the prisoner, and whether the sheriff had any authority to deliver the prisoner to the warden is immaterial.

The court had jurisdiction of the person and the offense and the Governor had the power and authority of commutation, and whether the procedure was in full conformity to the requirements of the State laws or Constitution can neither be inquired into on habeas corpus nor in a United States court. If properly in the custody of the warden it is not material here what irregularities occurred in placing him in custody.

Also, Sec. 1. Chap. 108, Stat. Illinois, makes the penitentiary at Joliet the prison for the confinement of convicts, and there is no need the penitentiary shall be particularized in the commutation.

e. The citations of counsel as to keeping the prisoner in the penitentiary at hard labor have no application in the State of Illinois. The statutes of the State require that in case of imprisonment in the penitentiary, the prisoner shall be kept at hard labor. The various sections of the statutes relating to different offenses and declaring the punishment to be imprisonment in the penitentiary, make no reference to hard labor. Keeping the prisoner at hard labor is not of itself made an element of the punishment for the offense charged, as in the cases cited by counsel for Fielden and Schwab. Whenever convicts are confined in the Illinois penitentiary, keeping them at hard labor results by requirement of the statute relating to the penitentiary, and as one of the consequences of being confined in the penitentiary. Sec. 1, chap. 108. Rev. Stat. Ill. In Illinois the distinctive punishments of "confinement in the penitentiary" and "confinement in the penitentiary at hard labor" are not known. The decisions quoted therefore, are not applicable to this cause. But if applicable, even that does not raise a federal question.

f. As to the contention that the Constitution requires process to run in the name of the people, without going into a full discussion of the question as to what constitutes process or when it is necessary, it is sufficient answer to say, that this is only a requirement of the Illinois Constitution and even its violation or disregard gives a United States court no jurisdiction in habeas corpus proceedings. The Federal laws or Constitution do not require that process shall be issued in any case after judgment as authority for the warden to hold a prisoner, nor do the State laws or Constitution contain such requirement.

The attempt to draw a distinction as to the official character of the two communications of the Governor of Illinois, is hardly worth considering. One is as much the command of the Governor in the exercise of the power conferred upon him by the constitution as the other. No State nor Federal laws require that his orders in such cases shall be attested by the great seal of State. Nor would his order be wanting in validity in so high a matter as the commutation of the punishment of death to imprisonment, because the Secretary of State might fail to attest the same even if such attestation were required, which in the State of Illinois it is not.

g. The complaint that the judgment fails to disclose that either Schwab or Fielden was found guilty of murder or any other offense, is frivolous in the extreme. Neither practice nor law requires the judgment in proceedings at law to contain the findings of the court. The petition, however, of Schwab, shows that he was arrested and indicted and found guilty upon the charge of murder and the judgment pronounced against him was pronounced "on the verdict of guilty heretofore rendered to the indictment in this cause." See Exhibit "D" p. 17.

h. Counsel suggest that the court should always grant the writ upon a proper petition and determine the right of the detention on the return to the writ. This may well be conceded, but this does not preclude the court from first determining whether or not the petition presented is a *proper* petition. In this case the court decides it is not a proper petition.

The pleadings in the habeas corpus case show an imprisonment in the penitentiary, under pretended authority of the State laws for a crime committed against the State. The imprisonment is in execution of the punishment under State authority. The court had jurisdiction of the offense and jurisdiction to enter the sentence it did. The imprisonment is not in violation of any law of the State nor is any law of this State under which the prisoner is held, in contravention of any law or the Constitution of the United States. Even if the imprisonment was under an erroneous judgment, or an improper execution of the laws of the State, the laws themselves not being in conflict with any provision of the Federal Constitution or Statutes, still the U. S. Circuit Court would not have jurisdiction in habeas corpus. Where the court has imposed sentence of imprisonment for a term in excess of the punishment authorized by law, the court having jurisdiction of the offense, it has been held habeas corpus will not lie.

If there are any errors in the imprisonment of petitioner they are errors under the State laws and the remedy is in the State Courts and not in the Federal courts, nor in habeas corpus proceedings.

We have made part of this brief, Appendix "A", extracts from the Constitution and Statutes of Illinois, and Appendix "B", extracts from the laws of all the States, in which the practice in the courts of last resort in such cases is regulated by statute, and in none of them is the presence of the prisoner required in such court when the record of his conviction is there reviewed or when judgment is entered. On the contrary, the inference from them is that his presence is not required, and this inference is fully sustained by the numerous decisions heretofore cited. The practice in the State of Illinois is in consonance with the practice in most of the States from the organization of the government to the present time.

The research which we have made on this point develops the fact that in many of the States there is almost an entire absence of specific statutory regulation and in all of them the procedure is largely under the control of the court.

Feeling confident that the warden of the penitentiary has ample authority for the detention of the prisoner and that such detention is just, we ask that the judgment of the Circuit Court in the Schwab case be affirmed, and having like confidence in the correctness of the decision of the Supreme Court of the State of Illinois on the motion in the Fielden case, we ask that said decision be affirmed, or the writ of error be dismissed.

GEORGE HUNT,
Attorney-General of the State of Illinois, for Defendants in Error and Appellee.

E. S. SMITH,
Of Counsel.

APPENDIX "A."

Constitution.

Section 2 of Article VI, of the Constitution of Illinois is as follows:

"Sec. 2. The Supreme Court shall consist of seven judges, and shall have original jurisdiction in cases relating to the revenue in mandamus and habeas corpus, and appellate jurisdiction in all other cases. One of said justices shall be chief justice; four shall constitute a quorum, and the concurrence of four shall be necessary to every decision."

Section 8, same article, is:

"Section 8. Appeals and writs of error may be taken to the Supreme Court, held in the grand division in which the case is decided, or, by consent of the parties, to any other grand division."

Section 13, Article V, is:

"The Governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses, subject to such regulations as may be provided by law relative to the manner of applying therefor."

Murder is defined by statute as follows, (Chap. 38):

"Sec. 140. Murder is the unlawful killing of a human being, in the peace of the people, with malice aforethought, either expressed or implied. The unlawful killing may be perpetrated by poisoning, striking, starving, drowning, stabbing, shooting, or by any other of the various forms or means by which human nature may be overcome, and death thereby occasioned. Express malice is the deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart."

Section 142, same chapter, is:

Sec. 142. "Whoever is guilty of murder, shall suffer the punishment of death, or imprisonment in the penitentiary for his natural life, or for a term of not less than fourteen years. If the accused is found guilty by a jury, they shall fix the punishment by their verdict; upon a plea of guilty the punishment shall be fixed by the court."

Section 1, Div. XIV, of the Criminal Code (Chap. 38) is:

"The manner of inflicting punishment shall be by hanging the person convicted, by the neck until dead, at such time as the court shall direct, not less than fifteen nor more than twenty-five days from the time sentence is pronounced: *Provided*, the day set shall not occur before the tenth day of the term of the Supreme Court occurring (in either of the grand divisions) next after the pronouncing of the judgment: *And provided*, that for good cause the court or Governor may prolong the time. At the expiratime of the time so prolonged, the judgment shall be executed the same as if that were the time fixed by the judgment for the execution thereof."

Sec. 2. "Whenever any person shall be condemned to suffer death by hanging, for any crime of which such person shall have been convicted in any court of this State, such punishment shall be inflicted within the walls of the prison of the county in which such conviction shall have taken place, or within a yard or enclosure adjoining such prison."

Sec. 3. "It shall be the duty of the sheriff, or the deputy sheriff of the county, to be present at such execution, and, by at least three days previous notice, to invite the presence of the judges, prosecuting attorney, and clerks of the courts of said county, together with two physicians and twelve reputable citizens, to be selected by said sheriff or his deputy. And the said sheriff or deputy shall, at the request of the criminal, permit such ministers of the gospel, not exceeding three, as said criminal shall name, and any of the immediate relatives of said criminal, to be present at said execution, and also such officers of the prison, deputies and constables as shall by him be deemed expedient to have present; but no other person than those herein mentioned shall be permitted to be present at such execution, nor shall any person, not a relative of the criminal, under the age of twenty-one years, be allowed to witness the same."

"Sec. 6. In all cases where the punishment shall be confinement in the penitentiary, if the case is tried by a jury, the jury shall say in their verdict for what time the offender shall be confined, and the court, in pronouncing sentence, shall designate what portion of time the offender shall be confined to solitary imprisonment and what portion to hard labor."

"Sec. 18. When a convict shall be sentenced to imprisonment in the penitentiary, the clerk of the court shall forthwith deliver a certified copy of the judgment to the sheriff or other proper officer of the county, who shall, without delay, convey the convict to the penitentiary of the State, and deliver him to the warden thereof."

Section one, Div. XV, same chapter, is:

"Sec. 1. In any prosecution by indictment for a capital offense, when the sentence is death, the party aggrieved by manifest and material error, appearing of record, may be relieved by writ of error in the following manner, to-wit:

"1. He shall obtain a certified copy of the record from the clerk, and a certificate from the judge who tried the cause, or from the prosecuting officer on the trial, that he is of opinion that such record contains a full and true history of the proceedings on the trial.

"2. He shall present such transcript and certificate, with an assignment of the errors relied upon, to the Supreme Court, if in session, or to one of the judges thereof in vacation.

"3. If, after inspecting such transcript, the court or judge is of opinion that there is reasonable cause for allowing a writ of error, and shall also be of the opinion that there is a reasonable doubt as to the guilt of the defendant, it shall be granted by indorsement on the back of such transcript, with a direction that the same shall be a supersedeas.

"4. Upon the filing of such transcript and order, the clerk of the Supreme Court shall issue a supersedeas to stay the execution of the sentence of death until the further order of the court, but the prisoner shall not be discharged from jail.

"Sec. 2. If the judgment is affirmed, the Supreme Court shall, by order, fix the time when the original sentence of death shall be executed, a copy of which order shall be sufficient authority to the sheriff for the execution of the prisoner at the time therein specified.

"Sec. 3. Writs of error in all criminal cases, where sentence is not death, shall be considered as writs of right, and issued of course.

"Sec. 4. When a supersedeas is desired, a transcript of the record, with a certificate and assignment of errors, must be presented to the Supreme Court, if in session, or to one of the judges thereof in vacation, in like manner as in cases where the sentence is death.

"Sec. 5. If, after inspecting the transcript, the court or judge is of opinion that there is reasonable cause for allowing a writ of error, and shall also be of the opinion that there is a reasonable doubt as to the guilt of the defendant, it shall be granted by indorsement upon the back of the transcript, with a direction that the same be made a supersedeas, and supersedeas shall issue in like manner and with like effect as in cases where the sentence is death.

"Sec. 6. When the court or judge is of opinion that the party obtaining such writ of error ought to be bailed until the determination of the writ, and he is at the time in custody, the said court or judge may make an order to admit such prisoner to bail, upon his entering into a recognizance to the People of the State of Illinois, in such sum, and with such security, as said court or judge shall prescribe, conditioned that the prisoner will appear at the next term of the court in which his trial took place, and at each subsequent term of said court, on the first day thereof, until the determination of such writ of error, and will not at any of the terms of said court depart the court without leave, and that in case the judgment is affirmed he will surrender himself to the sheriff, or warden, or other officer from whose custody he is bailed.

"Sec. 7. If the prisoner is in custody of the sheriff, he shall take the recognizance; if in custody of the warden of the penitentiary, he shall take the recognizance. In either case, the recognizance shall be returned to the next term of court in which the prisoner was sentenced, and there entered of record, and such proceedings may be had thereon, in case of breach of the conditions thereof, as in other cases of recognizance."

Sec. 8 declares: "If the judgment is affirmed, the Supreme Court shall direct the court in which the original sentence was rendered to carry the same into effect, and shall give judgment against plaintiff in error for costs."

"Sec. 11. In case of the reversal of any judgment upon which any person has been committed to the penitentiary, and the granting of a new trial by the Supreme Court, it shall be the duty of the warden of the penitentiary, upon receiving a certified copy of such judgment of the Supreme Court, to deliver the person so committed to the custody of the sheriff of the county where such new trial is to be had, and of such sheriff to take and reconvey such person to the jail of his county, and for such services the sheriff shall be allowed and paid like fees as in the case of commitments to the penitentiary."

Section 17, Div. XIII, Criminal Code,

"Exceptions may be taken in criminal cases, and bills of exceptions shall be signed and sealed by the judge, and entered of record, and error may be assigned thereon by the defendant, the same as in civil cases. *Provided,* That in no criminal case shall the people be allowed an appeal, writ of error or new trial."

Section 88, Chapter 110, Rev. Statutes.

"Appeals from and writs of error to Circuit Courts, the Superior Court of Cook county, the Criminal Court of Cook county, county courts and city courts in all criminal cases, below the grade of felony, shall be taken directly to the appellate court, and in all criminal cases above the grade of misdemeanors, and cases in which a franchise or freehold or the validity of a statute or construction of the constitution is involved, and in all cases relating to revenue, or in which the State is interested as a party or otherwise, shall be taken directly to the Supreme Court. In all cases of writs of error and appeals, prosecuted or taken from any decision of any of the appellate courts to the Supreme Court, it shall not be necessary for the clerk of the Appellate Court, in which said cause was heard and determined, to make out and certify a copy of the original transcript of the record, filed in the said Appellate Court, but it shall be sufficient for, and it is hereby made the duty of the clerk of said Appellate Court, to transmit the original transcript of the record filed in his office, authenticating the same, with a true and perfect copy of all the orders and proceedings appearing of record in said cause; which said copy of the record and proceedings duly authenticated with the seal of said court, shall be transmitted to, and filed in the Supreme Court, and the clerk of the Appellate Court, shall be entitled to receive from the party procuring said record and transcript, the fees allowed by law, for his certificate and copy of the proceedings had in the Appellate Court, and he shall not be entitled to charge or receive any fee for copying or transmitting said original transcript, other than for his certificate, and the reasonable cost of sending said transcript and record from his office, either by mail or express to the clerk of the Supreme Court. That all laws or parts of laws in conflict with this act are hereby repealed."

Section 8, Div. XIII, Criminal Code.

"All trials for criminal offenses shall be conducted according to the course of the common law, except when this act points out a different mode, and the rules of evidence of the common law shall also be binding upon all courts and juries in criminal cases except as otherwise provided by law."

Sec. 1, Chap. 108, Ill. Stat., is as follows:

"Section 1. That the penitentiary, at Joliet, in the County of Will, until otherwise provided by law, shall be the general penitentiary and prison of this State for the confinement and reformation as well as for the punishment of, all persons sentenced by any court of competent jurisdiction in this State, for the commission of any crime the punishment of which is confinement in the penitentiary, in which the person so sentenced shall be securely confined, employed at hard labor, and governed in the manner hereinafter directed."

APPENDIX "B."

The statutes of Missouri provide that the allowance of an appeal in a capital case shall operate as a supersedeas and provide for supersedeas in other cases.

Sec. 4282, Vol. 1, Rev. Stat. Mo., declares:

"If the defendant in the judgment so ordered to be stayed shall be in custody it shall be the duty of the sheriff * * * * to keep defendant in custody without executing the sentence which may have been passed, to abide such judgment as may be rendered upon the appeal or the writ of error."

Sec. 4298 declares: "When the appeal is taken, or the writ of error is sued out by the party indicted, if the Supreme Court affirm the judgment of the court below it shall direct the sentence pronounced to be executed and the same shall be executed accordingly."

Nevada Statutes, Sec. 4337.

"When an appeal has been taken from a judgment of death, the Appellate Court and any judge thereof in vacation may suspend the execution until the appeal is heard and determined."

'Sec. 4366. The defendant need not appear in the Appellate Court."

"Sec. 4382. After conviction and upon an appeal the defendant may be admitted to bail, as follows:

"First—If the appeal be from a judgment imposing a fine only, etc. Second—If judgment of imprisonment have been given, that he will surrender himself in execution of the judgment upon its being affirmed, or modified, or upon the appeal being dismissed."

Criminal Code, Nebraska, Ch. 48, Sec. 509, declares:

"In all cases of conviction when the punishment shall be capital, the judges or court allowing such writ of error shall order a suspension of the execution until such writ of error shall be heard and determined: upon hearing such writ of error they shall order the prisoner to be discharged, a new trial to be had, or appoint a day certain for the execution of the sentence, as the nature of the case may rerequire."

Chap. 51, Sec. 564, provides that in case of affirmance and fixing a day certain for execution of the sentence which has been suspended, "it shall be the duty of the Clerk of the Supreme Court to issue to said sheriff his warrant commanding him to proceed to carry said sentence into execution at the time so appointed, * * * and it shall be the duty of said sheriff to cause said sentence to be executed as aforesaid." and to make return, etc.

In New York in case of appeal execution of sentence may be stayed upon certificate of the judge. See Sec. 527-8 of the Code of Criminal procedure.

Sec. 530 declares:

"If the certificate provided for in sections 527 and 528 be given, the sheriff must, if the defendant be in his custody, upon being served with a copy of the order, keep the defendant in his custody, without executing the judgment and detain him to abide the judgment upon appeal."

Sec. 541. "The defendant need not personally appear in the Appellate Court."

Sec. 546. "On a judgment of affirmance against the defendant the original judgment must be carried into execution as the Appellate Court may direct."

In the State of Massachusetts, sentence is not pronounced until all exceptions have been passed upon by the Supreme

Court. But when questions are raised in the trial court, and they are reserved for the full bench, the accused is not required to be present at the consideration, discussion or decision of the points in the Supreme Court.

Sec. 1635, of the Statutes of Connecticut, provides that a defendant in a criminal prosecution may sue out a writ of error as in civil actions. No writ of error to reverse the judgment upon a conviction for an offense punishable by death shall supersede the execution of such judgment unless made returnable to the next succeeding term of court, or allowed by a majority of the judges of the court.

There is no provision requiring the presence of plaintiff in error in the Supreme Court when the case is heard or decided.

Sec. 1636 provides that when judgment shall not be executed at the time assigned, and shall not be reversed, the Supreme Court of Errors, after the final determination of such writ, shall appoint the time for the execution of such judgment, and the clerk of such court shall issue a writ of execution therefore accordingly.

Texas.—Art. 803, Title IX, of the Code of Criminal Procedure of the State of Texas, provides that when, for any cause, the warrant cannot be executed at the time specified, the sheriff shall return it to the clerk with the reasons for not executing it, and shall report in writing to the judge of the District Court, either in term time or vacation, the fact that the warrant is not executed and the reasons therefor, and the judge shall thereupon fix another time for the execution of such sentence, and shall issue his written order to the proper clerk, directing such clerk to issue another warrant for the execution of such sentence, specifying in such order the time fixed for the execution thereof; and the clerk shall file such order among the papers in the case and immediately issue a warrant accordingly, and the execution of such warrant shall proceed as in the first instance.

Art. 340, Title X, p. 100, declares: "The defendant to a criminal action need not be personally present upon the hearing of his cause in the Court of Appeals: but he may appear in person in cases where, by law, he is not committed to jail upon appeal.

"Art. 341. When the defendant appeals in any case of felony, he shall be committed to jail until the decision of the Court of Appeals can be made and received."

Mississippi Statutes, Sec. 2341:

"A person convicted of felony shall not be entitled to be released from imprisonment, pending an appeal to the Supreme Court, unless it shall be so ordered by the court in which the conviction was had or by the Supreme Court, * * * * and the making of such order shall be a matter of discretion with either court or judge, to be exercised with the greatest caution, and only when the peculiar circumstances of the case render it proper in the opinion of the court or judge."

In Iowa, an appeal taken by defendant does not stay execution unless bail be put in, except—

"Sec. 4529. Where the judgment is imprisonment in the penitentiary, and an appeal is taken during the term at which the judgment is rendered, and the defendant is unable to give bail, and that fact is satisfactorily shown to the court, it may in its discretion order the sheriff or officer having the defendant in custody to detain him in custody without taking him to the penitentiary to abide the judgment of the appeal if the defendant desire it."

The Statutes of Maine, p. 946, Ch. 134, Sec. 26, provide that in criminal cases questions of law may be reserved for decision by justices of the Supreme Court. and that the defendant may, when the offense is bailable, recognize, conditioned that said defendant shall appear in said court *in which said indictment is pending* from term to term until and including the term of said court next after the certificate of decision shall be received from said justices, and shall abide the decision and order of said court, and not depart without leave. If he does not so recognize he shall be committed.

And Sec. 28 declares: "When a final judgment in any criminal case is reserved by the Supreme Judicial Court upon a writ of error, on account of error in the sentence, the court may render such judgment therein as should have been rendered, or may remand the case for that purpose to the court before whom the conviction was had."

Sec. 284 provides that in criminal cases not capital the court *may* admit the plaintiff in error to bail, the condition of which is that, "the prisoner will appear in the next District Court to be holden in the county wherein the trial of such prisoner took place and at each subsequent term of the District Court, on the first days, until the determination of such writ of error, and that he will be present and submit to such orders as the Supreme Court may make in the premises, and will not at any of the terms of the court in which he shall be bound to appear by said recognizance depart the court without leave. * * * Upon the affirmance of any judgment brought into the Supreme Court by virtue of this section, the said court shall order and direct the District Court to carry into effect the judgment of the court below."

Sec. 4263, p. 1122, Code of Georgia, provides in case of writ of error, "if the offense is not bailable the judge shall order a supersedeas at the time of fiiling the bill of exceptions."

Statutes of Indiana, Sec. 1895, declares:

"When a judgment against the defendant is reversed, and it appears that no offense whatever has been committed, the Supreme Court must direct that the defendant be discharged; but if it appears that the defendant is guilty of an offense * * * the Supreme Court must direct the warden of the State prison, or the chief officer in charge of the penal or reformatory institution in which the defendant is confined, to cause the prisoner to be delivered over to the jailor of the proper county, there to abide the order of the court in which he was convicted."

The Statutes of Arkansas, 1884, p. 536, section 2213, provide:

"If the indictment be for a felony, the defendant must be present during the trial."

Section 2332, p. 550:

"Whenever a judgment of death has not been executed on the day appointed therefor by the court from any cause whatever, the Governor, by a warrant under his hand and the seal of the State, shall fix the day of the execution."

Section 2455, p. 567, relating to appeals to the Supreme Court in criminal cases, declares:

"When a judgment of death has been affirmed and the date of execution passed, the Clerk of the Supreme Court shall transmit to the Governor a certificate of the affirmance and of the judgment, to the end that a warrant for the execution of the judgment may be issued by the Governor."

Section 2458:

"If a judgment of confinement in the penitentiary has been executed before the certificate of appeal was delivered to the sheriff, whose duty it was to execute the judgment, the defendant shall remain in the penitentiary during the pendency of the appeal, unless discharged by the expiration of his term of confinement or by pardon."

The statutes of Minnesota, 1878, p. 96, Sec. 7, declares:

"No assignment of errors or joinder of error is necessary upon any writ of error issued in a criminal case, but the court shall proceed on the return thereto, and render judgment upon the record before them. If the court affirms the judgment, it shall direct the sentence pronounced to be executed, and the same shall be executed accordingly. If it reverses the judgment rendered, it shall either direct a new trial, or that the defendant be discharged, as circumstances may require."

Section 8 provides for the accused entering into recognizance pending the appeal, and section 9 provides:

"If any person so appealing or taking a writ of error does not so recognize, he shall be committed to prison to await the decision of the Supreme Court, and in that case, the clerk of the court in which the conviction was had shall file a certified copy of the record and proceedings in the case in the Supreme Court, and the court shall have cognizance thereof, and consider and decide the questions of law, and shall render judgment or make such order thereon as law and justice require."

Code of Alabama, p. 187, Sec. 4519:

"If the defendant is in the custody of the sheriff, and the order allowing the writ (of error) directs a stay of proceedings on the judgment, the sheriff must on being served with the clerk's certificate that the order has been filed, and with a copy of the order, keep and detain the defendant in his custody, without executing the sentence which may have been passed on his conviction, to abide the judgment that may be rendered on the writ of error."

Penal Code of California, Sec. 1243, provides for a certificate of the judge in case of appeal by the defendant in a criminal case, and Sec. 1244 declares:

"If the certificate provided for in the preceding section is filed the sheriff must, if the defendant be in his control, upon being served with a copy thereof, keep the defendant in his custody without executing the judgment, and detain him to abide the judgment on appeal."

Sec. 283, p. 364, Statutes of Colorado, provides for writ of error in a capital case, and declares:

"The allowance of such writ of error shall be sufficient authority to the clerk of the Supreme Court to issue a supersedeas to stay the execution of the sentence of death but not the discharge of the prisoner from jail. When any judgment, the execution whereof has been stayed by writ of error as aforesaid, shall be affirmed and the Supreme Court shall, by order, fix the time when the original sentence of death shall be executed, a copy of such order shall be sufficient authority to the sheriff for the execution of any person therein mentioned at the time specified."

Tennessee Statutes, Sec. 6090.

Defendant in misdemeanor cases admitted to bail in case of appeal. No provision for bail in felony cases.

North Carolina statutes authorize entering into recognizance in case of an appeal in bailable offenses only. The recognizance is that the defendant shall "make his appearance at the first term of the Superior or Criminal Court to be held in the county and to further answer the charge preferred."

Code, Criminal Proceedings, Sec. 1236.

Ohio Statutes, 1880, Vol. 2, Sec. 7360.

"In capital cases, when the judgment is affirmed, and the day fixed for the execution of the sentence is passed, the court shall appoint a day therefor."

When a defendant has been committed to the penitentiary and the judgment on which he was committed is reversed, whereby the defendant is entitled to his discharge, the clerk of the court where the judgment of record was entered shall certify the same to the warden of the penitentiary and he shall immediately discharge the prisoner." Secs. 7364-5.

Oregon Statutes, Sec. 1440.

In case of appeal by defendant in criminal case execution may be stayed upon certificate of a judge.

Sec. 1442, declares, "If the certificate provided for in Sec. 1440 be given, the sheriff must, if the defendant be in his custody, upon being served with a certified copy thereof, keep the defendant in his custody, without executing the judgment, and detain him to abide the judgment upon appeal."

"The defendant need not personally appear in the Appellate Court." Sec. 1447.